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No. 83-

IN THE
Supreme Court of the United States
OCTOBER TERM, 1983

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY,
Petitioner,

v.

PAUL D. JOHNSON, *et al.*,
Respondents.

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

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QUESTIONS PRESENTED

1. Whether the builder of an interstate rapid transit system that purchases compensation benefits for injured laborers, pursuant to its obligation under a federally-approved interstate Compact to act as general contractor, is entitled to the statutory immunity from suit granted to contractors by the Longshoremen's and Harbor Workers' Compensation Act, or whether, as held by the District of Columbia Circuit, injured employees may recover both compensation and damages from the builder.

2. Whether the builder forfeits its statutory immunity from suit simply because it initially purchased workers' compensation protection for all construction employees rather than first demanding that contractors—many of whom were uninsurable—themselves obtain workers' compensation insurance.

LIST OF PARTIES

Paul D. Johnson was the appellant in Nos. 82-2017, 82-1899, and 82-2458, before the United States Court of Appeals for the District of Columbia Circuit. Howard L. Eighmey was appellant in Nos. 82-1784, 82-2148, and 82-2531. Calvin Walker was appellant in Nos. 82-1809, and 82-2529. Calvin Walker and Rena Walker were appellants in Nos. 82-2062. John Warren Clanagan was appellant in Nos. 82-1813, 82-2063, and 82-2530. Stanley Wilmes was appellant in Nos. 82-2374, and 82-2525. James H. Buchanan and Shirley Buchanan were appellants in No. 82-2459. Glenwood Williams was appellant in No. 83-1003.

The Washington Metropolitan Transit Authority, Bechtel Associates Professional Corp., D.C., and Bechtel Civil and Minerals, Inc., were appellees in each case before the Court of Appeals.*

* Bechtel Associates Professional Corp., D.C., and Bechtel Civil and Minerals, Inc. are affiliates of Bechtel Group, Inc. Other affiliates of Bechtel Group, Inc., include Bechtel Power Corp., Bechtel Petroleum, Inc., Bechtel Investments Inc., and Bechtel Professional Corporation, Virginia. Also appearing in the District Court but not in the Court of Appeals were Gordon H. Ball, Inc., S. A. Healy Co., Granite Construction Co., James McHugh Construction Co., McClean, Grove & Skanska, Fruin-Colnon Construction Co., Horn Construction Co., J. F. Shea Construction Co., Morrison-Knudsen Contractors, Shea-S&M Joint Venture, and Slatery Associates, Inc.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	(i)
LIST OF PARTIES	ii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	2
RELEVANT STATUTES	2
STATEMENT	4
STAGES AT WHICH THE FEDERAL QUESTIONS WERE RAISED AND PRESERVED	8
REASONS FOR GRANTING THE PETITION.....	9
CONCLUSION	26
APPENDICES	1a
APPENDICES	
A through G—District Court Decisions Grant- ing WMATA's Motions for Sum- mary Judgment	1a
APPENDICES	
H through L—District Court Decisions Deny- ing Plaintiffs' Motions for Post- judgment Relief	32a
APPENDIX M—Court of Appeals' Decision.....	37a
APPENDIX N—Court of Appeals' Decision Deny- ing Petition for Rehearing....	65a
APPENDIX O—Court of Appeals' Decision Deny- ing Suggestion for Rehearing En Banc	66a
APPENDIX P—Court of Appeals' Order Staying Issuance of Mandate	67a

TABLE OF AUTHORITIES

Cases:	Page
<i>Bloomer v. Liberty Mutual Ins. Co.</i> , 445 U.S. 74 (1980)	20
<i>Cardillo v. Liberty Mutual Ins. Co.</i> , 330 U.S. 469 (1947)	9, 10
<i>Director v. Rasmussen</i> , 440 U.S. 29 (1979)	14
<i>Evans v. Newport News Shipbuilding & Dry Dock Co.</i> , 361 F.2d 364 (4th Cir. 1966)	17
<i>Fearson v. Johns-Manville Sales Corp.</i> , 525 F. Supp. 671 (D.D.C. 1981)	18
<i>Fiore v. Royal Painting Co.</i> , 398 So. 2d 863 (Fla. Dist. Ct. App. 1981)	22
<i>Ford Motor Credit Co. v. Cenance</i> , 452 U.S. 155 (1981)	14
<i>Hilton v. Fifteen Hundred Massachusetts Ave., Inc.</i> , 261 F.2d 377 (D.C. Cir. 1958)	5
<i>Hilyer v. Morrison-Knudsen Construction Co.</i> , 670 F.2d 208 (D.C. Cir. 1981), <i>rev'd sub nom. Morrison-Knudsen Construction v. Director</i> , 103 S.Ct. 2045 (1983)	9
<i>Jones & Laughlin Steel Corp. v. Pfeifer</i> , 103 S.Ct. 2541 (1983)	11, 13
<i>Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran</i> , 456 U.S. 353 (1982)	15
<i>Morrison-Knudsen Constr. Co. v. Director</i> , 103 S.Ct. 2045 (1983)	9, 10, 18
<i>New York Central R.R. Co. v. White</i> , 243 U.S. 188 (1917)	10, 15
<i>Pallas Shipping Agency, Ltd. v. Duris</i> , 103 S.Ct. 1991 (1983)	18
<i>Potomac Electric Power Co. v. Director</i> , 449 U.S. 268 (1980)	9, 10, 12, 15
<i>Potomac Electric Power Co. v. Director</i> , 606 F.2d 1324 (D.C. Cir. 1979), <i>rev'd</i> , 449 U.S. 268 (1980)	9
<i>Potomac Electric Power Co. v. Wynn</i> , 343 F.2d 295 (1964)	19
<i>Riley v. U.S. Industries/Federal Sheet Metal, Inc.</i> , 627 F.2d 455 (D.C. Cir. 1980), <i>rev'd sub nom. U.S. Industries/Federal Sheet Metal, Inc. v. Director</i> , 455 U.S. 608 (1982)	9

TABLE OF AUTHORITIES—Continued

	Page
<i>Rodriguez v. Compass Shipping Co.</i> , 451 U.S. 596 (1981)	19, 20
<i>State ex rel. Reynolds v. City of Baltimore</i> , 86 A.2d 618 (Md. 1952)	17
<i>United States v. Hastings</i> , 103 S.Ct. 1974 (1983) (Blackmun, J.)	19
<i>U.S. Industries/Federal Sheet Metal, Inc. v. Director</i> , 455 U.S. 608 (1982)	16
<i>Statutes:</i>	
28 U.S.C. § 1254(1) (1976)	2
Longshoremen's and Harbor Workers' Compensation Act (1976)	
33 U.S.C. § 904	<i>passim</i>
33 U.S.C. § 905	<i>passim</i>
33 U.S.C. § 910	18
33 U.S.C. § 933(b)	18
33 U.S.C. § 938	22
Washington Area Transit Authority Interstate Compact (Pub. L. No. 89-774, 80 Stat. 1324) (1966)	2, 5
<i>Statutes:</i>	
Act of May 17, 1928, ch. 612, § 1, 45 Stat. 600	10, 11
Act of Aug. 16, 1941, ch. 357, § 1, 55 Stat. 622 (codified as amended at 42 U.S.C. §§ 1651-1654) ..	4
Act of Dec. 2, 1942, ch. 668, Title I, § 102, 56 Stat. 1031 (codified as amended at 42 U.S.C. § 1702) ..	4
Act of June 19, 1952, ch. 444, § 2, 66 Stat. 139 (codified as amended at 5 U.S.C. §§ 8171-8173)	4
Act of Aug. 7, 1953, ch. 345, § 4(c), 67 Stat. 462 (codified as amended at 43 U.S.C. § 1333(c))	4
District of Columbia Workmen's Compensation Act (1973)	
36 D.C. Code § 501	3, 4, 11
36 D.C. Code § 502	4
Act of July 1, 1980, D.C. Law 3-77, 27 D.C.R. 2503 ..	4
D.C. Code § 36-303(e) (1981)	4

TABLE OF AUTHORITIES—Continued

	Page
Ind. Code Ann. § 22-3-2-14 (Burns 1974)	14
Md. Code Ann. Art. 101, § 62 (Michie 1979)	17
N.C. Gen. Stat. § 97-10.1 (1979 repl. vol.)	14
Neb. Rev. Stat. § 48-116 (1978)	14
1922 N.Y. Laws ch. 615, § 56	15
Va. Code Ann. § 65.1-30 (1980)	17
<i>Congressional Material:</i>	
H.R. Rep. No. 1767, 69th Cong., 2d Sess. (1927)....	10
H.R. Rep. No. 1357, 70th Cong., 1st Sess. (1928)....	10
H.R. Rep. No. 1422, 70th Cong., 1st Sess. (1928)....	10
H.R. Rep. No. 1441, 92d Cong., 2d Sess. (1972).....	11
Hearings before Sub. of House Comm. on Appropriations, 92d Cong., 2d Sess. (March 20, 1972) ..	13
S. Rep. No. 973, 69th Cong., 1st Sess. (1926)	10
S. Rep. No. 852, 70th Cong., 1st Sess. (1928)	10
<i>Miscellaneous:</i>	
Barrett, "Insurance for Urban Transportation Construction" (Dept. of Com. 1977)	24, 25
Becker & Denenberg, <i>Wrap-Up of the Wrap-Up</i> , The CPCU Annals (September 1967)	24
J. Boyd, <i>A Treatise on the Law of Compensation for Injuries to Workmen Under Modern Industrial Statutes</i> (1913)	10, 14
H. Bradbury, <i>Worker's Compensation Law</i> (3d ed. 1917)	15
Dudley, <i>Wrap Up Programs Not for the Unsophisticated</i> , National Underwriter (May 20, 1983)....	25
Fed. R. Civ. P. 59(e)	1
Fed. R. Civ. P. 60(b) (3)	1
A. Larson, <i>The Law of Workmen's Compensation</i> (1982)	10, 14
Report by the Comptroller General of the United States, <i>Longshoremen's and Harbor Workers' Compensation Act Needs Amending</i> (Apr. 1982)	18
Sullivan, <i>Casualty Insurance for Contractors</i> , The Constructor (April 1962)	25

TABLE OF AUTHORITIES—Continued

	Page
Urban Mass Transportation Administration, Department of Transportation, Circular C 1165.1 (December 30, 1977)	23
Westran, <i>Advantages of Wrap Up Plans</i> , The CPCU Annals (Winter 1965)	25
"Wrap-Up Study," Insurance Buyers' Council, Inc., submitted to Gen. Serv. Admin. (August 22, 1975)	17, 25
20 C.F.R. § 701.301(a) (13) (1982)	13

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**PETITION FOR A WRIT OF CERTIORARI TO THE
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Petitioner Washington Metropolitan Area Transit Authority prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this matter.

OPINIONS BELOW

The decisions of the United States District Court for the District of Columbia granting WMATA's motions for summary judgment (Appendices A-G, App. 1a-31a) are not officially reported. The decisions of the District Court denying plaintiffs' motions for postjudgment relief under Fed. R. Civ. P. 59(e) and 60(b)(3) (Appendices H-L, App. 32a-36a) are not officially reported. The decision of the United States Court of Appeals for the District of Columbia Circuit (Appendix M, App. 37a-64a) from

which certiorari is sought, is not yet officially reported. The orders of the Court of Appeals denying a Petition for Rehearing and a Suggestion for Rehearing En Banc (Appendices N and O, App. 65a, 66a) are not officially reported. The Court of Appeals' Order staying issuance of its mandate to November 7, 1983, pending the filing of a petition for a writ of certiorari (Appendix P, App. 67a) is not officially reported.

JURISDICTION

The Court of Appeals' decision in these cases was rendered on August 19, 1983 (App. 41a). A timely Petition for Rehearing and Suggestion for Rehearing En Banc was filed on September 2, 1983, and denied on October 3, 1983 (App. 65a, 66a). The jurisdiction of this Court rests upon 28 U.S.C. § 1254(1).

RELEVANT STATUTES

Section 12 of the Washington Metropolitan Area Transit Authority Interstate Compact (Pub. L. No. 89-774, 80 Stat. 1324 (1966)) provides, in part:

12. In addition to the powers and duties elsewhere described in this Title, and except as limited in this Title, the Authority may:

(d) Construct * * * real and personal property * * * but all of said property * * * shall be necessary or useful in rendering transit service or in activities incidental thereto; * * *

(f) Enter into and perform contracts * * * with any person, firm or corporation * * * including, but not limited to, contracts or agreements to furnish transit facilities and service; * * *

(i) Contract for or employ any professional services; * * *

(m) Exercise * * * all powers reasonably necessary or essential to the declared objects and purposes of this Title.

Section 4 of the Longshoremen's and Harbor Workers' Compensation Act (33 U.S.C. § 904 (1976)) provides:

(a) Every employer shall be liable for and shall secure the payment to his employees of the compensation payable under sections 907, 908, and 909 of this title. In the case of an employer who is a subcontractor, the contractor shall be liable for and shall secure the payment of such compensation to employees of the subcontractor unless the subcontractor has secured such payment.

(b) Compensation shall be payable irrespective of fault as a cause for the injury.

Section 5 of the Longshoremen's and Harbor Workers' Compensation Act (33 U.S.C. § 905 (1976)) provides, in part:

(a) The liability of an employer prescribed in Section 904 of this title shall be exclusive and in place of all the liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law * * * on account of such injury or death
* * *

District of Columbia Code § 36-501 (1973) provides:

The provisions of Chapter 18 of Title 33, U.S. Code, including all amendments that may hereafter be made thereto, shall apply in respect to the injury or death of an employee of an employer carrying on any employment in the District of Columbia, irrespective of the place where the injury or death occurs; except that in applying such provisions the term "employer" shall be held to mean every person carrying on any employment in the District of Columbia, and the term "employee" shall be held to mean every employee of any such person. (May 17, 1928, 45 Stat. 600, ch. 612, § 1).

STATEMENT

A. Introduction.

The central issue in each of these seven cases, consolidated on appeal before the United States Court of Appeals for the District of Columbia Circuit, is whether the Washington Metropolitan Area Transit Authority ("WMATA") is entitled to the immunity from employee suits guaranteed to the sole workers' compensation provider by every workers' compensation act ever adopted in this Nation. That issue arises in a context in which the facts material to this Petition, as found by five separate District Court judges and as acknowledged by the Court of Appeals, are not in dispute. The only issues are pure questions of law. They concern the interpretation of two provisions of the Longshoremen's and Harbor Workers' Compensation Act ("LHWCA"), 33 U.S.C. §§ 904 and 905(a), that have remained unchanged since their adoption in 1927. They have been incorporated into the District of Columbia Workmen's Compensation Act, 36 D.C. Code §§ 501-502 (1973),¹ as well as into several other federal laws.² And on those questions, the District Court and Court of Appeals judges have split 5-3 on the question of whether WMATA is entitled to that immunity.

¹ Although a new District of Columbia statute went into effect on July 26, 1982 (Act of July 1, 1980, D.C. Law 3-77, 27 D.C.R. 2503), that Act adopts LHWCA Section 904(a) as Section 36-303(c) of the new District of Columbia Workers' Compensation Act.

² The LHWCA is also applicable to (a) employees on defense bases (Act of Aug. 16, 1941, ch. 357, § 1, 55 Stat. 622 (codified as amended at 42 U.S.C. §§ 1651-1654)); (b) employees of nonappropriated fund instrumentalities, such as post exchanges (Act of June 19, 1952, ch. 444, § 2, 66 Stat. 139 (codified as amended at 5 U.S.C. §§ 8171-8173)); (c) employees of government contractors injured overseas by war-risk hazards (Act of Dec. 2, 1942, ch. 668, Title I, § 102, 56 Stat. 1031 (codified as amended at 42 U.S.C. § 1702)); and (d) workers on oil drilling rigs on the outer continental shelf (Act of Aug. 7, 1953, ch. 345, § 4(c), 67 Stat. 462 (codified as amended at 43 U.S.C. § 1333(c))).

B. The WMATA Wrap-Up Program.

WMATA is an interstate agency created by the Washington Metropolitan Area Transit Authority Interstate Compact, Pub. L. No. 89-774, 80 Stat. 1824 (1966). In that Compact, the States of Maryland and Virginia, and the District of Columbia agreed, with Congressional approval, to construct and operate an interstate rapid transit system, colloquially known as the Metro. Furthermore, that Compact authorized WMATA, as the interstate agency of each signatory, to construct and operate the system, as well as to delegate or subcontract portions of that project to others. WMATA Compact §§ 2, 4, 12. In carrying out that mandate, as every court below found, WMATA alone purchased the workers' compensation coverage for all Metro construction laborers required by the LHWCA under one comprehensive, "wrap-up" insurance program, typical of those now universally used in massive construction projects. As discussed below, WMATA did so because its experience had proved, and the insurance industry had made clear, that only WMATA could provide continuous protection for all construction laborers.

C. The Proceedings Below.

Each of the plaintiffs³ was a construction laborer hired by one of the various subcontractors with whom WMATA had contracted to build the Metro transit system. Prior to filing these suits, each plaintiff had filed a compensation claim against the insurance purchased by WMATA for injuries sustained while working as a Metro construction laborer, and several had already received sizeable compensation awards (*e.g.*, \$120,000).⁴ In these suits,

³ In three of the cases, both the laborer and his wife filed suit. Because an employee's spouse may not bring suit where the employee himself is barred (33 U.S.C. § 905(a); *see, e.g., Hilton v. Fifteen Hundred Massachusetts Ave., Inc.*, 261 F.2d 377, 378 (D.C. Cir. 1958)), we will refer to the laborers alone as plaintiffs.

⁴ Every plaintiff has now recovered a compensation award (App. 42a).

each plaintiff sought to supplement that award by also recovering tort damages from WMATA for the same injuries.⁶ In each case, WMATA moved for summary judgment on the ground, *inter alia*, that it was immune from suit under LHWCA Sections 904 and 905(a).

D. The District Courts' Decisions.

Each of the five District Court judges (Smith, Richey, Flannery, Corcoran, & June Green, JJ.) granted WMATA's motion for summary judgment, ruling that WMATA was immune from suit under Section 905(a) (App. 1a-31a). Each judge found that WMATA was the general contractor for the Metro transit system.⁸ Furthermore, these judges all found that WMATA, rather than any of the subcontractors, had purchased the workers' compensation insurance that had funded the compensation awards to the individual plaintiffs.⁷ Based upon those findings, each District Court judge ruled that WMATA was entitled to the immunity from employee suits granted to every compensation provider by Sections

⁶ The plaintiffs also sued WMATA's agents, Bechtel Associates Professional Corporation, D.C., and Bechtel Civil and Minerals, Inc. ("Bechtel"). The Court of Appeals affirmed the District Courts' dismissals of the suits against Bechtel on the ground that Bechtel was immune from suit under Section 80 of the WMATA Interstate Compact as WMATA's agents (*see* App. 43a-49a).

⁸ For instance, Judge Green found that "WMATA is in the position of overall general contractor for subway construction in the Washington, D.C. area, with the responsibility of supervising numerous consultants, general contractors, and subcontractors" (App. 1a).

⁷ For instance, Judge Corcoran found that "[h]ere by agreement with its subcontractors, the general contractor, WMATA, became the sole purchaser of workmen's compensation coverage; and it was from that coverage that the plaintiff received his benefits" (App. 10a). To the same effect are App. 1a-2a, 7a, 14a.

904 and 905(a).⁶ Judge Flannery's conclusion in this regard is typical of the uniform rulings by the District Court judges:

Under the WMATA Compact, WMATA clearly fulfills the function of overall general contractor of the rapid transit system, and, as purchaser of workers' compensation insurance, is entitled to statutory immunity from suit. [App. 28a-29a; *see also id.* 2a, 10a, 16a, 21a, 24a-25a.]

E. The Court of Appeals' Decision.

The Court of Appeals reversed. At the outset, the court accepted the crucial factual findings made by each District Court Judge. The Court of Appeals acknowledged that (a) "WMATA exercises the ultimate control of and authority for the construction and operation of the subway system" (App. 42a); (b) the injured employees "were employed by construction companies under contract to WMATA to construct specific segments of the Metro project" (*id.* 49a); (c) "[t]hese subcontractors did *not* purchase workmen's compensation insurance for their employees" (*id.* 49a-50a; *emphasis in original*); (d) "WMATA purchased such insurance to cover all laborers and other employees working on the Metro system" (*id.* 50a); and (e) "[a]fter sustaining an injury, each employee filed for and received workmen's compensation benefits" (*id.*). Nonetheless, the Court of Appeals ruled that WMATA was not entitled to immunity from suit under Section 905(a) of the LHWCA because WMATA, before itself obtaining that insurance, had failed to await the subcontractors' inability to obtain workers' compensation coverage for Metro laborers, or the default of the subcontractors or their insurance carriers (*id.* 51a-57a).

⁶ As Judge Corcoran ruled, "[i]t has long been recognized that the purchase of workmen's compensation coverage and the payment of benefits is the *quid pro quo* for the release under § 905(a) from common law liability" (App. 9a; citations omitted).

The Court of Appeals ruled that "the overall purpose and design of the Longshoremen's Act" was to construe the Act "liberally in favor of the injured employee" so as to assure that an injured employee would not be deprived of either his compensation or his claim in damages against third parties" (*id.* 51a). The court concluded that "[t]o accord WMATA section 905 employer immunity would frustrate the operation of the Act" (*id.* 54a). The court interpreted Section 904 of the Act to require a subcontractor to obtain workers' compensation insurance, and "[t]he general contractor is not obligated to obtain insurance 'unless' the subcontractor fails to do so" (*id.* 52a). The court purported to buttress that interpretation by relying upon three prior decisions denying a contractor immunity when *both* the contractor *and* the subcontractor had purchased workers' compensation insurance, or when the subcontractor *alone* had done so (*id.* 52a-54a). The court concluded that "[t]o benefit from securing the insurance, WMATA must *first* require its subcontractors to purchase the insurance" and "only by providing compensation insurance *when the subcontractors fail to do so* [may] WMATA obtain immunity as a statutory employer" (*id.* 54a-55a; emphasis in original).⁹

STAGES AT WHICH THE FEDERAL QUESTIONS WERE RAISED AND PRESERVED

WMATA opposed the construction of the LHWCA adopted by the Court of Appeals before the District Court and the Court of Appeals, and all courts below specifi-

⁹ Notwithstanding the Court of Appeals' affirmation of the uniform finding in the District Court that "[t]hese subcontractors did not purchase workmen's compensation insurance for their employees" (App. 49a-50a; emphasis in original), the court wrote that "[w]e express no opinion on the issue whether the *subcontractors* have 'secure[d]' compensation insurance under Section 904(a) and would thereby be entitled to immunity" (App. 56a n.16; emphasis in original).

cally ruled upon the issues raised in this Petition (App. 1a-31a; 49a-57a).

REASONS FOR GRANTING THE PETITION

Central to every workers' compensation program enacted throughout this century has been a compromise between the interests of employers and employees. In this compromise, employers relinquished their defenses to common law tort actions in exchange for absolute but limited liability to their employees, and immunity from employees' suits for employment-related injuries. See, e.g., *Morrison-Knudsen Constr. Co. v. Director*, 103 S. Ct. 2045, 2052 (1983); *Potomac Electric Power Co. v. Director*, 449 U.S. 268, 281-282 (1980) ("*Pepco*"); *Cardillo v. Liberty Mutual Ins. Co.*, 330 U.S. 469, 476 (1947).

The decision below rejects that principle. The court denied to the sole compensation provider the immunity from employee suits historically recognized as an integral component of any workers' compensation program, and explicitly provided for by Section 904 and 905(a) of the LHWCA. Accordingly, that decision stands in derogation of this Court's decisions in *Morrison-Knudsen*, *Pepco*, and *Cardillo*. In addition, for the fourth time in almost as many years, and contrary to the straightforward language of Sections 4 and 5(a) of the original Act (33 U.S.C. § 904 and 905(a)), the District of Columbia Circuit has superimposed upon employers covered under the LHWCA additional burdens that are nowhere found in the plain language of the Act, or suggested by the Act's legislative history and underlying purposes.¹⁰ For each of these reasons, the construction of the LHWCA adopted

¹⁰ See also *Hilyer v. Morrison-Knudsen Constr. Co.*, 670 F.2d 208 (D.C. Cir. 1981), *rev'd sub nom. Morrison-Knudsen Constr. Co. v. Director*, 103 S. Ct. 2045 (1983); *Riley v. U.S. Industries/Federal Sheet Metal, Inc.*, 627 F.2d 455 (D.C. Cir. 1980), *rev'd sub nom. U.S. Industries/Federal Sheet Metal, Inc. v. Director*, 455 U.S. 608 (1982); *Potomac Electric Power Co. v. Director*, 606 F.2d 1324 (D.C. Cir. 1979), *rev'd*, 449 U.S. 268 (1980).

by the Court of Appeals is so plainly in error as to warrant this Court's summary disposition of the case.

1. The Plain Language of the Statute.

Any inquiry must begin with the plain language of the statute and the reason why workers' compensation programs were adopted. See, e.g., *Pepco*, 449 U.S. at 273-274, 281-282 & n.24. These programs struck a balance between the interests of employers and employees to prevent employees or their dependents from succumbing to accident-induced destitution. Employers relinquished their tort defenses in exchange for limited and predictable liability, while employees obtained certain but limited compensation awards.¹¹ Congress incorporated these principles into both the LHWCA¹² and the District of Columbia Workmen's Compensation Act.¹³ "[T]he concept of compromise is central to the LHWCA, as adopted by the District of Columbia Workmen's Compensation Act." *Pepco*, 449 U.S. at 282 n.24; see *Cardillo*, 330 U.S. at 476.

The applicable provisions effectuating that compromise, 33 U.S.C. §§ 904 and 905(a) (Sections 4 and 5 of the original Act¹⁴), are the centerpiece of the LHWCA, as

¹¹ See, e.g., *New York Central R.R. Co. v. White*, 243 U.S. 188, 201-204 (1917); J. Boyd, *A Treatise on the Law of Compensation for Injuries to Workmen Under Modern Industrial Statutes* § 4 (1913); 1 A. Larson, *The Law of Workmen's Compensation* § 2.10 (1982).

¹² See, e.g., H.R. Rep. No. 1767, 69th Cong., 2d Sess. 19-20 (1927); S. Rep. No. 973, 69th Cong., 1st Sess. 16 (1926); *Morrison-Knudsen*, 108 S. Ct. at 2052.

¹³ See, e.g., Act of May 17, 1928, ch. 612, § 1, 45 Stat. 600; H.R. Rep. No. 1422, 70th Cong., 1st Sess. 1-2 (1928); H.R. Rep. No. 1357, 70th Cong., 1st Sess. 1-2 (1928); S. Rep. No. 852, 70th Cong., 1st Sess. 1-3 (1928); *Pepco*, 449 U.S. at 281-282 & n.24; *Cardillo*, 330 U.S. at 476.

¹⁴ Current Section 905(a) of the LHWCA is the only subdivision of Section 905 applicable here. Congress adopted the District of

incorporated by Congress into the law of the District of Columbia. The first sentence of Section 904(a) requires "[e]very employer" governed by the Act to obtain workers' compensation insurance for its employees, and also makes those same employers liable for the compensation payments specified elsewhere in the Act. Section 904(b) then makes the liability for compensation absolute, and Section 905(a), in turn, makes this liability "exclusive and in place of all other liability of such employer to the employee * * *." Where the "employer" is a "subcontractor," however, Congress imposed a different set of obligations. In that situation, the second sentence of Section 904 provides that "the contractor shall be liable for and shall secure the payment of such compensation * * * *unless the subcontractor has secured such payment*" (emphasis added). In other words, the second sentence of Section 904(a) substitutes the contractor for the employer-subcontractor with respect to the obligations imposed by that provision.

Under the plain language of Section 904(a), therefore, a contractor is obligated to purchase workers' compensation insurance and to make the statutory compensation payments. The only exception obtains where a subcontractor has relieved WMATA of this obligation by itself

Columbia Workmen's Compensation Act in 1928, and incorporated into that law the then-existing provisions (as modified) of the LHWCA. See Act of May 17, 1928, ch. 612, 45 Stat. 600. Section 905(a) was originally enacted in 1927 as Section 5 of the original LHWCA (44 Stat. 1526), whereas Section 905(b) was not enacted until 1972. Therefore, Congress could not have adopted Section 905(b) as part of the 1928 District of Columbia Workmen's Compensation Act. Because it is the District of Columbia version of the LHWCA that is at issue here, D.C. Code § 36-501 (1973) provides the governing law, and that provision does not incorporate LHWCA Section 905(b).

In addition, the text and legislative history of Section 905(b) make clear that it is limited to a maritime context. See H.R. Rep. No. 1441, 92d Cong., 2d Sess. 4-8, 22 (1972); *Jones & Laughlin Steel Corp. v. Pfeifer*, 103 S. Ct. 2541, 2547-48 & n.7 (1983).

obtaining workers' compensation insurance, a situation which *every* court below agreed is not present here. The construction of Section 904(a) adopted by the Court of Appeals—characterizing WMATA's obligation "as *"secondary"* and its subcontractors' obligations as *"primary"*—is irreconcilable with the literal language of that section. That section clearly states that, where the employer is a subcontractor, "the *contractor* shall be liable for and shall secure the payment of * * * compensation" (emphasis added), thereby squarely imposing upon contractors the statutory duty to provide compensation. In so doing, that section plainly supplants any duty subcontractors would otherwise have as "employers" under the first sentence of Section 904(a). Furthermore, because the contractor is relieved of his statutory duty only where a subcontractor "has secured" compensation payments, the mere possibility that a subcontractor could have obtained compensation insurance is of no consequence. A contractor has a continuing duty to obtain compensation insurance, and a subcontractor, by contrast, has no duty *at all* to obtain such insurance.

Therefore, because a contractor fills the role of a subcontractor-employer with respect to the obligations imposed by Section 904(a), that contractor should also naturally receive the immunity to which a subcontractor-employer would otherwise be entitled under Section 905(a). By providing compensation, the contractor becomes entitled to the immunity Congress and this Court have recognized to be "central" to the bargain struck in the LHWCA. *Pepco*, 449 U.S. at 282 n.24. Otherwise, Section 904(a) would skew the compromise by imposing the compensation burden upon contractors without providing them with the benefit of immunity. That Congress did not reiterate the term "contractor" in Section 905(a) is immaterial in this regard. Because Section 904(a) substitutes the "contractor" for the subcontractor-"employer" whose liability is absolute under Section 904(b), the term "employer" contained in Section 905(a) is itself sufficient

to encompass a "contractor" where that contractor has shouldered the duty of obtaining compensation for employees. The federal regulations implementing the LHWCA define the term "employer" as used in the Act to include "any employer who may be obligated as an employer under the provisions of the LHWCA as amended or any of its extensions [e.g., D.C. Workers' Compensation Act] to pay and secure compensation as provided therein." 20 C.F.R. § 701.301(a)(13) (1982) (emphasis added.) This definition clearly indicates that it is the obligation to pay and secure compensation that determines who is an "employer" subject to the Act, not whether one is an immediate employer or, as in WMATA's case, an employer one step removed. The contrary interpretation would attribute to Congress a failure to recognize the effect of Section 904(a) with respect to contractors and an accompanying intent to nullify, solely for contractors, the effect of the compromise that Sections 904 and 905(a) embody.¹⁵ Hence, only by construing Section 905(a) to award immunity to contractors can the otherwise conflicting provisions of Section 904 and 905(a) be reconciled. *Cf., e.g., Pfeifer*, 103 S. Ct. at 2546-47.

The Court of Appeals, therefore, has simply rewritten, rather than interpret, the LHWCA to state, in effect:

The contractor has a secondary liability for compensation benefits; it shall first compel subcontractors to secure the payment of such benefits. If the subcontractor fails to secure such payment, then and only then is the contractor required to secure payment of such benefits.

If Congress had intended to impose such a two-step process, surely it would have said so somewhere in the lan-

¹⁵ WMATA's wrap-up program was brought to Congress's attention at least 10 years ago and evoked no adverse comment or reaction. In fact, the hearing resulted in the continued funding of the entire WMATA project, including its wrap-up program. *E.g.*, Hearings before Sub. of House Comm. on Appropriations, 92d Cong., 2d Sess., 408, 417-419 (Mar. 20, 1972).

guage of Section 904(a). Other legislatures have expressly imposed such a two-step process in the plain language of their statutes when they so intended. For example, the Nebraska workers' compensation law provides that a contractor is not liable for compensation benefits if it "requires the contractor or subcontractor * * * to procure a policy [of insurance]." Neb. Rev. Stat. § 48-116 (1978); *see also* Ind. Code Ann. § 22-3-2-14 (Burns 1974); N.C. Gen. Stat. § 97-10.1 (1979 repl. vol.). Accordingly, it would have been quite simple for Congress to have drafted the two-step scheme set forth in the Court of Appeals opinion. Congress did not do so, however, and the federal courts may not superimpose additional requirements for immunity atop those Congress has written into the statute. *Cf. Director v. Rasmussen*, 440 U.S. 29, 46-47 (1979).

2. Legislative History.

Nothing in the legislative history of either the LHWCA or District of Columbia Workmen's Compensation Act suggests that Congress intended to impose upon contractors the additional obligation created by the Court of Appeals. Hence, the statutory language is controlling. *See, e.g., Ford Motor Credit Co. v. Cenance*, 452 U.S. 155, 158 n.3 (1981). But even if that language were not conclusive—which it is—the available evidence of Congressional intent as well as the policies underlying the Acts support the literal meaning of Sections 904 and 905(a).

The original New York Compensation Act, and the British Compensation Act of 1906, upon which the New York Act was based, provided that the principal was liable for compensation to a contractor's and subcontractor's employees and was also thereby entitled to immunity from suit by those employees. *See J. Boyd, A Treatise on the Law of Compensation for Injuries to Workmen Under Modern Industrial Statutes* § 56, at 90-91 (1913) (reprinting New York Act); *id.* § 577, at 1140 (reprint-

ing British Act); *see also* 1922 N.Y. Laws ch. 615, § 56 (requiring contractors in hazardous employment to secure workers' compensation for subcontractors' employees unless subcontractor has secured compensation). Because the LHWCA was based upon the New York Act (*Pepco*, 449 U.S. at 275), it is fair to presume that Congress intended Sections 904 and 905(a) to incorporate both the obligations and benefits contained in the model New York and British Acts. Moreover, the principles underlying the LHWCA and District of Columbia Act were drawn from the then-existing workers' compensation systems extant throughout the States, and under many of those acts a principal was liable for compensation to the employees of its contractors and subcontractors. H. Bradbury, *Workers' Compensation Law* 264 (3d ed. 1917). At the same time, in the "contemporary legal context" prevailing when Congress adopted these Acts (*Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 379 (1982)), not only was the *quid pro quo* nature of workers' compensation legislation universally accepted, but this Court had even suggested that it was constitutionally required. *See, e.g., New York Central R.R. Co. v. White*, 243 U.S. at 201-202.

The Court of Appeals' construction of the Act also undermines two fundamental purposes thereof. On the one hand, employees are put at risk of being left without *any* compensation coverage, because until the subcontractor obtains coverage to satisfy its supposedly "primary" obligation, there is no coverage *at all* for employees. Furthermore, because subcontractors or their insurance carriers often default upon their obligation (which history had proven to be the case here, and which is the apparent reason Congress structured Section 904(a) in the manner it is written), construction laborers would often be left without any coverage during their lapses. Congress plainly intended to prevent that result, however, by requiring the contractor to obtain coverage unless a sub-

contractor "has secured" its own insurance, thereby assuring that no such gap could occur.

On the other hand, the decision below completely robs WMATA of any benefit of the margin struck by Congress. The Court of Appeals acknowledged that WMATA had in fact purchased such insurance and had also paid each plaintiff his statutory compensation award. In these circumstances, denying WMATA immunity from later suits by these employees effectively converts the LHWCA from a compensation program into a life and disability insurance plan, a form hitherto alien to workers' compensation law.¹⁶ Nothing in the legislative history of the LHWCA suggests that Congress intended any such anomalous result.

3. Anamolous Results.

The decision below will necessarily lead to several additional anomolous results that Congress plainly never intended, and that will frustrate a general contractor's ability effectively to fulfill its obligations under the LHWCA. That decision, moreover, will potentially nullify WMATA's attempt to satisfy its affirmative action obligations under other provisions of federal or District of Columbia law. These incongruous results demonstrate the need to give the plain language of the Act its literal meaning and highlight the error in the interpretation below. Unless this Court reverses, the consequences of the Court of Appeals' construction threaten to eviscerate the socially-beneficial effects of wrap-up insurance programs generally, as well as WMATA's ability to operate the Metro interstate transit system in a fiscally-sound manner.¹⁷

¹⁶ See *U.S. Industries/Federal Sheet Metal, Inc. v. Director*, 455 U.S. 608, 615-616 n.10 (1982) ("[w]orkmen's compensation legislation has never been intended to provide life or disability insurance for covered employees").

¹⁷ The Court of Appeals theorized, without any factual support, that such programs may not maximize a covered subcontractor's

(a) The Court of Appeals' decision creates a conflict between the law of the District of Columbia and that of Maryland and Virginia, the other two signatories to the WMATA Interstate Compact. Both Maryland and Virginia clearly bar suit against a general contractor in circumstances like those present here.¹⁸ The decision below therefore has the anomalous effect of denying WMATA immunity *only* in the District of Columbia. That result is intolerable for an interstate agency like WMATA for whom uniformity in the applicable law is essential.

(b) The immediate impact of the decision below will be to render WMATA vulnerable to thousands of tort suits for past and future claims arising out of the operation of the Metro transit system. Since July 31, 1972, over 22,000 compensation claims have been filed against WMATA by construction laborers for injuries allegedly sustained in the construction of the still-incomplete Metro, resulting in a total of \$112 million in compensation payments. Many, if not most, of these claims can even now serve as a predicate for a tort suit against

incentive to maintain a safe work place. But there are many incentives for safety other than the direct payment of insurance premiums. For example, federal and state regulations, employer-employee relations, union demands, contractual obligations, the company's reputation, and numerous other factors motivate a company to maintain a safe work place. The court ignored the fact that WMATA, the party who pays the premiums, could and would shut down any unsafe operations and that an unsafe work record is an adequate ground for contract cancellation. Moreover, when the Insurance Buyers' Council conducted a wrap-up study for the General Services Administration in 1975, it concluded that "safety" was one of the very reasons for recommending that wrap-up insurance be provided for larger and more hazardous construction projects. "Wrap-up Study," Insurance Buyers' Council, Inc., submitted to Gen. Serv. Admin. (August 22, 1975), at 17, 32.

¹⁸ See, e.g., Md. Code Ann. art. 101 § 62 (Michie 1979); *State ex rel. Reynolds v. City of Baltimore*, 86 A.2d 618 (Md. 1952); Va. Code Ann. § 65.1-30 (1980); *Evans v. Newport News Shipbuilding & Dry Dock Co.*, 361 F.2d 364 (4th Cir. 1966).

WMATA. At present, over 95% of all compensation claims are resolved through the administrative process without resort to either administrative or judicial litigation of compensation claims.¹⁹ Hence, a claimant can bring suit against WMATA, even after a decade has passed, on any claim that did not result in "an award in a compensation order filed by the deputy commissioner or [Benefits Review] Board." 33 U.S.C. § 933(b); see *Pallas Shipping Agency, Ltd. v. Duris*, 103 S. Ct. 1991, 1994-96 (1983).²⁰ Because compensation awards are usually limited to two-thirds of a worker's average weekly wages (33 U.S.C. § 910), WMATA's liability for past claims alone could well run into the millions of dollars. Moreover, because WMATA, like any governmental entity, is subject to repeated suits as a fact of life, WMATA's potential future liability dwarfs its potential retroactive liability.

(c) As explained more fully below (pp. 22-23), the result in this case will also effectively price minority contractors out of any opportunity to participate in the further construction or continued operation of the Metro interstate transit system—an intent hardly envisioned by Congress and one, in fact, that flies in the face of Congressional policy expressed in other statutes.

¹⁹ See *Morrison-Knudsen*, 103 S. Ct. at 2052; Report by the Comptroller General of the United States, *Longshoremen's and Harbor Workers' Compensation Act Needs Amending* 31, 41 (Apr. 1982).

²⁰ The District of Columbia applies the so-called discovery rule to determine the commencement of the statutory limitations period. See, e.g., *Fearson v. Johns-Manville Sales Corp.*, 525 F. Supp. 671 (D.D.C. 1981) (limitation period does not begin to run until the plaintiff knows or should have known about his specific injury and its cause.) Under that rule a plaintiff who has made a compensation claim for lung injury, in general, will be able to claim that the limitations period for a negligence action for silicosis or some other particular lung condition does not commence until he receives a specific diagnosis of that injury.

4. "Liberal Construction."

The Court of Appeals invoked the doctrine of liberal construction, quoting its earlier decision in *Potomac Elect. Power Co. v. Wynn*, 343 F.2d 295, 296 (1964): " 'Narrow statutory construction should not deprive the injured employee of either his compensation or his claim in damages against third parties' " (App. 51a). The Court of Appeals failed to note, however, that this Court had unequivocally overruled *Wynn* more than two years ago. *Rodriguez v. Compass Shipping Co.*, 451 U.S. 596, 614-617 (1981).²¹

Even more to the point, the Court of Appeals' statement stands the doctrine of liberal construction on its head and uses it to produce the exact opposite of its true purpose. This is because a "liberal" construction for the benefit of the employee in a tort suit against an employer produces the narrowest possible concept of "employer," which thereafter controls *all compensation claims*. While doing a favor for the employee-plaintiff who happens to be before the court in a tort suit, the court has diminished the compensation rights of a far greater number of workers who in the future will be deprived of the income and medical benefits they need to survive, because the fewer the number of "employers," the less compensation will be provided.²²

²¹ Inexplicably, the Court of Appeals acknowledged that this Court's decision in *Rodriguez* was controlling with respect to another issue discussed below (*see* App. 60a-64a), but wholly failed to recognize that *Rodriguez* had overruled *Wynn* (*see* App. 51a (relying upon *Wynn* without even citing *Rodriguez*)). That failure itself justifies this Court's exercise of its supervisory power to vacate the judgment below for reconsideration in light of *Rodriguez*. *Cf., e.g., United States v. Hastings*, 103 S. Ct. 1974, 1982 (1983) (Blackmun, J.).

²² We need look no further than respondents' brief below to find the most spectacular illustration of what happens when liberal construction is given full play in this type of tort case. Their first and principle argument was that WMATA was not a statutory employer

Some courts have become so tort-minded that they have forgotten the basic purpose of the act: to provide assured compensation protection in all cases. Dazzled by a few dramatic recoveries, they overlook the far more numerous everyday injuries for which no tort suit against the general contractor will lie—heart attacks, back injuries, inevitable accidents, injuries due to the negligence of other independent contractors or their employees, not to mention injuries due to the claimants' own negligence.

This same emphasis upon tort recovery is visible in the Court of Appeals' treatment of Section 904 as if it were part of an overall "statutory scheme" to provide tort recoveries to employees. Section 904 does not contain a word about tort liability.²³ It deals exclusively with compensation liability and insurance. The court stated that WMATA's wrap-up insurance would "frustrate the operation of the Act" as if the Act were designed to provide tort recovery. But the "operation of the Act" is to provide assured compensation benefits—promptly, efficiently, and without dispute. Why, once a claimant has received everything the Act can provide, is the Act frustrated because the particular party who has already paid that compensation cannot also be saddled with tort liability?

5. The Unmanageability of the Result Below.

Actual experience demonstrates that the system of insurance insisted upon by the Court of Appeals simply

at all under Section 904 (pp. 1-22). If this argument had succeeded, WMATA would have had no compensation liability, and no statutory obligation to see that its subcontractors were insured. In a typical injury to an employee of an uninsured subcontractor that was not due to WMATA's negligence, the employee would have been completely without remedy.

²³ To the contrary, Congress intended "to minimize the need for litigation as a means of providing compensation for injured workers." *Rodriguez*, 451 U.S. at 616; *Bloomer v. Liberty Mut. Ins. Co.*, 445 U.S. 74, 86 (1980).

cannot work, even if it were required by the Act—which it is not. Prior to 1971, subcontractors working on Metro purchased their own compensation insurance.²⁴ In order to meet its Section 904 obligation, WMATA attempted to monitor literally hundreds of subcontractors and insurance programs.²⁵ WMATA, however, could not ascertain at any specific time whether all subcontractors maintained their compensation insurance in full force and effect (Ison Tr. at 68, 102-103). Some contractors were submitting their world-wide corporate policies as being in compliance with the contract requirements. But these policies often did not supply the required coverages, because the limits were not sufficient to contain the contractor's losses at all locations. In addition, substandard insurance companies unfortunately do exist, and a number of contractors used them. At various times and for various reasons, the policies of certain subcontractors lapsed or were dropped (*id.* at 68, 70-71). In fact, approximately 50% of WMATA's *prime* contractors were cancelled by their insurance carriers.

Moreover, there was the practical impossibility of finding an insurance carrier or group of carriers that would commit itself to providing individual coverage for the hundreds of subcontractors and sub-subcontractors (*id.* at 104-105). The insurance industry had made clear that it was (and still is) unwilling to provide separate coverage (up to the required \$50 million limit) for hundreds of individual contractors who are subject to common risks in one narrow geographical area (*id.* at 105). The prob-

²⁴ Deposition of Delmer Ison, WMATA's Secretary, Transcript at 65 (hereinafter "Ison Tr."). The transcript of Mr. Ison's testimony was included in Appellants' Record Excerpts filed with the Court of Appeals, but the pages in the Record Excerpts were not sequentially numbered.

²⁵ *Id.* at 67-69, 102-103. During the latter part of the 1970's, construction contracts required at least 600 different insurance programs and a minimum of 1800 separate insurance policies.

lem is not unique to WMATA: every subway construction project in the Nation has had to implement a single wrap-up program (*id.*). Accordingly, the Court of Appeals' decision denies WMATA immunity because WMATA did not demand that the subcontractors obtain coverage that WMATA knew was not available for *all* the subcontractors.

What can happen to an employer whose subcontractor, unbeknownst to the employer, fails to maintain the proper insurance coverage is illustrated by *Fiore v. Royal Painting Co.*, 398 So. 2d 863, 864 (Fla. Dist. Ct. App. 1981). There, the unwitting employer, even though it attempted to remedy the situation with compensation payments, was also subjected to common law liability. It was precisely this type of situation that WMATA attempted to avoid here. If an employer simply relies on the good faith or assurances of his subcontractor, he is taking serious risks. This, after all, is a criminal statute. Section 38(a) provides criminal penalties for any employer, including officers of a corporation, who fail to secure the payment of compensation required by the Act (33 U.S.C. § 938), and, as pointed out above, WMATA may well be treated as an employer for purposes of this Act.

There is a further, extremely important, point. WMATA is required by law to hire a certain percentage of minority-run companies (Ison Tr. at 104). Yet these companies and other smaller companies were often unable to obtain compensation insurance at competitive rates or from established, dependable firms. Consequently, these companies either could not make successful bids for WMATA projects or had to obtain coverage from unreliable, "fly-by-night" insurance companies (*id.* at 103-104). Later, these subcontractors were able to participate in the construction of the Metro only because WMATA, through its wrap-up program, was itself able to secure the workers' compensation insurance for Metro construction laborers required by the LHWCA. Perhaps for this reason, the Department of Transportation in 1977 rec-

ommended that mass transit systems "provid[e] wrap-up insurance for contractors and subcontractors" to enable minority businesses to participate in such projects. Urban Mass Transportation Administration, Department of Transportation, Circular C 1165.1 (December 30, 1977), at 14. The decision below not only defeats this recommendation but in the process makes it impossible, in some instances, for WMATA to fulfill its statutory obligation to hire the required percentage of minority-operated companies.

In addition to these practical considerations is the simple fact that the wrap-up provides many significant advantages to workers, insurers, employees and the public that cannot be duplicated by any other type of insurance.²⁶

²⁶ Among its many advantages, as detailed in the many articles on this subject (*see, e.g.*, page 24 note 27 *infra*):

Administration. Since all contractors have the same coverage, limits, and policy terms, there is no necessity to review many policies for each construction contract to make certain that coverages afforded are in compliance with contract requirements.

Claim Handling. Since the same insurance carrier and staff adjust all claims, this assures a constant uniformity of claims handling for the entire project and eliminates the inconsistencies that would prevail if there were more than one carrier.

Loss Control Engineering. Loss prevention and inspection services are also subject to uniformity because one company supplies the service. This eliminates the variable approach that would be used under conventional methods.

Duplication of Insurance Costs. Only one premium is charged to cover all prime and subcontractors. The alternative would require these contractors, regardless of tier, to supply their own coverages, thus pyramiding insurance costs.

Elimination of Cross-Liability Litigation. The interfacing of one project with another often generates claims by one contractor against another—an expense which carriers anticipate and include in their premiums. This is avoided in the wrap-up program.

Avoidance of Construction Delays. The availability of insurance varies from day to day, and its cancellation, either before or at renewal dates, is always a possibility. If a contractor cannot obtain the coverage required by contract or by law, the construction work

6. The Importance of "Wrap-Up" Insurance and of the Case.

The decision below threatens to throttle an insurance program of relatively recent origin that has successfully met a serious, nationwide need. Wrap-up programs did not even come into widespread use until after World War II, and the first wrap-up accepted by a quasi-federal agency was not adopted until twenty years later. Becker & Denenberg, "Wrap-Up of the Wrap-Up," *The CPCU Annals*, September 1967, at 200 (hereinafter "Becker & Denenberg"). Over ten years later, an extensive study commissioned by the United States Department of Transportation concluded that transit "[p]rograms and projects of a size greater than \$60,000,000 should be CIP's [wrap-ups]." Barrett, "Insurance for Urban Transportation Construction" at 6-1 (Dept. of Com. 1977) (hereinafter "Barrett").²⁷ Perhaps this is why wrap-up insurance must stop. This possibility is eliminated under the wrap-up approach.

Participation by Small and Minority Contractors. As pointed out above, coverage for the majority of these contractors is either not available or is so expensive that it would preclude their participation in the project. The wrap-up program not only provides them an opportunity to participate but assists them in developing greater construction expertise.

Costs. The wrap-up program is primarily loss responsive. That is, each dollar of claim requires a dollar of premium. Charges for the insurance company's expenses and profit have been eliminated. Thus, virtually all premium dollars are used for claim payments.

Thus, in addition to meeting WMATA's Section 904 duty, wrap-up insurance substantially lessens WMATA's administrative burden and effectuates a substantial savings in costs (Ison Tr. at 69, 104). It frees WMATA's officials to perform other public duties, and it lessens the cost to the public of constructing the system—costs that will not be recaptured by future profits (*id.* at 114).

²⁷ Other studies have reached a similar conclusion. For example, an in-depth discussion of wrap-up insurance by the General Counsel of the John F. Kennedy Center for the Performing Arts and an Associate Professor of Insurance at the University of Pennsylvania concluded that "the wrap-up is . . . a sound approach to insurance for large construction projects. . . . The wrap-up appears to be the best marketing method for many owners planning multi-million

insurance has already been approved in one form or another for use in urban transportation construction by the legislatures in at least 23 states and the District of Columbia (Barrett, *supra*, at A-1 to A-4), and wrap-up programs are now common in large construction projects involving large numbers of contractors, subcontractors and sub-subcontractors (Ison Tr. at 105).

The ruling below is bound to have a strong, adverse impact on the development of this new trend in insurance coverage—all to the detriment of the worker as well as the employer. By failing to protect from tort liability the employer who obtains such insurance, the court has thrown in question the integrity of the wrap-up itself. Wherever a state statute or a contract imposes any insurance burden on a contractor or subcontractor on a large project, the decision below will be used to impose double liability on the general contractor who—in an attempt to make certain that every worker is fully covered—has sought out the wrap-up program as the only safe means of protecting everyone involved. Thus, the importance of the decision's adverse ripple effect throughout the construction and insurance industries can hardly be overstated. When this effect is added to the others already covered—the thwarting of the will of Congress, the impact on minority hiring, and the confusion, delay and uncertainty created in the enforcement of LHWCA compensation claims—it is clear that the case warrants not only review but summary disposition.

dollar construction projects." Becker & Deneberg, *supra*, at 216. Similarly, a study commissioned by the General Services Administration on wrap-up insurance in 1975 concluded: "It is therefore our opinion that the wrap-up technique should be used under either of the following circumstances: (a) Construction projects over \$20,000,000; or (b) Hazardous construction projects in populated areas." "Wrap-up Study," Insurance Buyers' Council, Inc., submitted to Gen. Serv. Admin. (August 22, 1975) at 17. See also Dudley, *Wrap-Up Programs Not for the Unsophisticated*, National Underwriter (May 20, 1983) at 36; Sullivan, *Casualty Insurance for Contractors*, The Constructor (April 1962) at 48; Westran, *Advantages of Wrap-Up Plans*, The CPCU Annals (Winter 1965) at 317-326.

CONCLUSION

To deny the party who has purchased workers' compensation insurance the benefit of immunity from employee suits that has historically gone hand-in-hand with the burden of paying for that insurance is, to say the least, judicially presumptuous. To do so by imposing upon the simple, straightforward language of the LHWCA a hitherto-unforeseen duty, nowhere suggested in the language, legislative history, or underlying policies of the Act, is to assume a role no federal court may discharge, much less on the basis of a lower court decision this Court has specifically and squarely overruled. For the foregoing reasons, we urge the Court to grant the petition and reverse the judgment below. Because of the Court of Appeals' disregard for the plain language of the LHWCA and this Court's precedents, the Court may wish to consider summary disposition.²⁸

Respectfully submitted,

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²⁸ See also page 19 & note 21, *supra*.

APPENDICES

APPENDICES

APPENDICES A through G	— District Court Decisions Grant- ing WMATA's Motions for Sum- mary Judgment	1a
APPENDICES H through L	— District Court Decisions Denying Plaintiffs' Motions for Postjudg- ment Relief	32a
APPENDIX M	— Court of Appeals' Decision	37a
APPENDIX N	— Court of Appeals' Decision Deny- ing Petition for Rehearing	65a
APPENDIX O	— Court of Appeals' Decision Deny- ing Suggestion for Rehearing En Banc	66a
APPENDIX P	— Court of Appeals' Order Staying Issuance of Mandate	67a

APPENDIX A

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 81-1261

HOWARD L. EIGHMEY, *et al.*,
Plaintiffs

v.

BECHTEL ASSOCIATES
PROFESSIONAL CORPORATION, D.C., *et al.*,
Defendants

[Filed Jul. 30, 1982]

MEMORANDUM OPINION

Washington Metropolitan Area Transit Authority (WMATA) paid workmen's compensation insurance for the plaintiff, Harold Eighmey. Mr. Eighmey received workmen's compensation for injuries sustained while working at the Tenley Circle subway construction site. The subcontractor which employed him did not carry workmen's compensation insurance. Hearings were held on July 15 and 26, 1982 to determine whether workmen's compensation law bars recovery against WMATA in this action.

I.

WMATA is in the position of overall general contractor for subway construction in the Washington, D.C. area, with the responsibility of supervising numerous consultants, general contractors, and subcontractors. Since 1971, WMATA has required all workmen's compensation claims by subway construction workers to be administered through its adjuster, the National Loss

Control Service Corporation, and all claims be paid by its carrier, Lumberman's Mutual Casualty Insurance Co.

The current District of Columbia workmen's compensation law, 1 D.C. Code § 501 *et seq.* (1973), adopts the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 901 *et seq.* (the Act). Section 4(a) of the Act, 33 U.S.C. § 904(a), states in relevant part:

Every employer shall be liable for and shall secure the payment to his employees of the compensation under (this Act). *In the case of an employer who is a subcontractor, the contractor shall be liable for and shall secure the payment of such compensation to employees of the subcontractor unless the subcontractor has secured such payment (emphasis supplied.)*

In this case, the subcontractor has not secured payment of workmen's compensation. WMATA as the overall general contractor is thus liable for such payment and has in fact provided it. WMATA's provision of insurance makes it a statutory employer entitled to the exclusiveness of liability under section 5(a) of the Act, 33 U.S.C. § 905(a). Since WMATA as general contractor provided compensation, the subcontractors which employed plaintiff were not required to provide the same.

An additional factor contributes to the Court's determination. WMATA is a quasi-public authority involved in subway construction in Maryland, Virginia and the District of Columbia. It is in the public interest to construe WMATA's liability to suit consistently in all three jurisdictions wherever possible. Maryland and Virginia would undoubtedly bar suit against WMATA as the general contractor or owner. *See Evans v. Newport News Shipbuilding & Dry Dock Co.*, 361 F.2d 364 (4th Cir. 1966); Va. Code § 65.1-30 (1973); *State ex rel. Reynolds v. City of Baltimore*, 86 A.2d 618 (1952); Md. Ann. Code art. 101 § 62 (Michie 1964).

II.

The cases relied upon by plaintiff are inapposite to this case. Here, only the general contractor, and not the subcontractor, has paid workmen's compensation. In *DiNicola v. George Hyman Construction Co.*, 407 A.2d 670 (D.C. 1979), the issue was whether a general contractor is the employer of the subcontractor's injured employee and thus immune from tort liability where the subcontractor had secured insurance and paid compensation to the employee. *Id.* at 672. The District of Columbia Court of Appeals held the general contractor who had not paid benefits subject to suit. Where both the general contractor and subcontractor carry workmen's compensation insurance, the general contractor acts in a supplementary and voluntary fashion, subjecting him to tort liability. *Thomas v. George Hyman Construction Co.*, 173 F.Supp. 81 (D.D.C. 1959). *Lindler v. District of Columbia*, 502 F.2d 495 (D.C. Cir. 1974), held the District of Columbia subject to suit by its contractor's employees who are injured in the performance of inherently dangerous work. In *Lindler*, the District employed a safety inspector to oversee construction of a watermain. In contrast to WMATA's contractual obligation here, there was no requirement for the District to pay workmen's compensation in the *Lindler* case; that the District as contractee ultimately bore the costs of such insurance was irrelevant. In *Probst v. Southern Stevedoring Company*, 379 F.2d 763, 767 (5th Cir. 1967), the Court left open the question answered here: what ought to be done when the general contractor or general employer is actually required to pay compensation benefits to the injured employee of the subcontractor?

Where, as here, WMATA is contractually obligated to pay workmen's compensation to its subcontractors' employees in place of any obligation of the subcontractor,

it becomes entitled to the exclusivity provisions of 33 U.S.C. § 905(a).

In accordance with the above, the Court dismisses WMATA as a defendant. Since no defendant remains, the Court dismisses this action without prejudice.

An appropriate order accompanies this opinion.

/s/ June L. Green
JUNE L. GREEN
U.S. District Judge

July 30, 1982

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 81-1261

HOWARD L. EIGHMEY, *et al.*,
Plaintiffs

v.

BECHTEL ASSOCIATES
PROFESSIONAL CORPORATION, D.C., *et al.*,
Defendants

[Filed Jul. 30, 1982]

ORDER

For the reasons expressed in the accompanying memorandum opinion and upon consideration of the arguments of counsel at hearings on July 15 and 26, 1982, plaintiffs' memorandum of points and authorities, plaintiffs' motion to supplement the record and accompanying documents, and the entire record in this section, it is by the Court this 30th day of July 1982,

ORDERED that plaintiffs' motion to supplement the record is granted; it is further

ORDERED, *sua sponte*, that Washington Metropolitan Area Transit Authority (WMATA) is dismissed as a defendant in this action; and it is further

ORDERED, *sua sponte*, that this action is dismissed without prejudice.

/s/ June L. Green
JUNE L. GREEN
U.S. District Judge

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 81-0963

PAUL D. JOHNSON,

Plaintiff,

v.

BECHTEL ASSOCIATES

PROFESSIONAL CORPORATION, D.C., *et al.*,
Defendants.

[Filed Aug. 24, 1982]

MEMORANDUM AND ORDER

Before the Court is the motion of the defendant Washington Area Transit Authority (WMATA)¹ for summary judgment. The plaintiff has opposed. WMATA contends that this action is barred by § 905(a) of the Longshoremen's and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. § 901 *et seq.* In the alternative, WMATA argues that the action is barred by the applicable statute of limitations. Upon consideration of the submissions of the parties, we conclude that § 905(a) forecloses this action. Accordingly, we do not reach the statute of limitations issues.

¹ Plaintiff's original complaint named Bechtel Associates Professional Corporation, D.C. and Bechtel Civil and Minerals, Inc. (Bechtel) as defendants. On May 18, 1982, plaintiff was permitted to amend the complaint to add WMATA as an additional defendant. On July 21, 1982, the action against Bechtel was dismissed by Order of this Court, because in the view of this Court, § 80 of the WMATA Compact barred the action against it. *See Johnson v. Bechtel Associates Professional Corp., D.C.*, C.A. No. 81-968 (D.D.C. July 21, 1982).

I. BACKGROUND

In this action plaintiff seeks damages for injuries allegedly sustained while working as a hardrock miner on the WMATA subway project. He was employed in that capacity by several subcontractors, over a period of years beginning in 1968. The subcontractors for whom the plaintiff worked were hired to perform construction services on the subway project by WMATA, the general contractor.

The plaintiff's employers, as subcontractors, did not obtain workmen's compensation insurance applicable to him. Instead, under the terms of their contractual arrangement with WMATA, WMATA, the general contractor, obtained the only compensation insurance covering the plaintiff for the injuries complained of in this action. Plaintiff applied for and received workmen's compensation benefits for his injuries from WMATA's compensation program.

The LHWCA embodies a scheme under which employers are required to purchase workmen's compensation coverage for their employees in exchange for immunity from common law liability arising from their employee's injuries.

Section 904(a) mandates the purchase of workmen's compensation coverage. It provides:

Every employer shall be liable for and shall secure the payment to his employees of the compensation payable under sections 907, 908, and 909 of this title. *In the case of an employer who is a subcontractor, the contractor shall be liable for and shall secure the payment of such compensation to employees of the subcontractor unless the subcontractor has secured such payment.* (Emphasis supplied)

Section 905(a) articulates the grant of immunity. It provides:

(a) The liability of an employer prescribed in section 904 of this title shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, except that if an employer fails to secure payment of compensation as required by this chapter, an injured employee, or his legal representative in case death results from the injury, may elect to claim compensation under the chapter, or to maintain an action at law or in admiralty for damages on account of such injury or death. In such action the defendant may not plead as a defense that the injury was caused by the negligence of a fellow servant, or that the employee assumed the risk of his employment, or that the injury was due to the contributory negligence of the employee.

Having purchased the workmen's compensation coverage from which plaintiff collected his benefits, WMATA asserts § 905(a)'s grant of immunity as a bar to this action.

Plaintiff contends, however, that WMATA may not claim the immunity granted in § 905(a) because it voluntarily assumed the responsibility of securing workmen's compensation coverage. In its view, WMATA is a "third party" subject to suit under § 933 of the LHWCA.

Section 933(a) provides:

If on account of a disability or death for which compensation is payable under this chapter the person entitled to such compensation determines that some person other than the employer or a person or persons in his employ is liable in damages, he need not elect whether to receive such compensation or to recover damages against such third person.

WMATA contends that its motivation for purchasing compensation coverage is irrelevant. In its view, it secured the coverage, paid the benefits, and should be entitled to § 905(a)'s release from liability.

For the reasons stated below, we agree with the defendant that § 905(a) bars this action against WMATA.

II. DISCUSSION

It has long been recognized that the purchase of workmen's compensation coverage and the payment of benefits is the *quid pro quo* for the release under § 905(a) from common law liability. *Thomas v. George Hyman Construction Co.*, 173 F.Supp. 381, 383 (D.D.C. 1959); *Linder v. District of Columbia*, 502 F.2d 495, 499 (D.C. Cir. 1974); *DiNicola v. George Hyman Construction Co.*, 407 A.2d 670, 672 (D.C. 1979). The party obligated by law to purchase the coverage is entitled to the § 905(a) grant of immunity. *Thomas v. George Hyman Construction Co.*, *supra* at 383. However, a party may not escape common law liability by securing workmen's compensation coverage not required by law. An employer may not voluntarily purchase compensation coverage and thereby benefit from § 905(a); for "release from common law liability is a benefit accruing from carrying compensation insurance only in case the law imposes a duty to do so." *Id.* at 383; *See also DiNicola v. George Hyman Construction Co.*, *supra* at 673 (quoting *Thomas* with approval).

Thus, a general contractor may not assert § 905(a) as a bar to an action by an employee of his subcontractor, where only the subcontractor has purchased workmen's compensation coverage for the employee. *Linder v. District of Columbia*, *supra*; *DiNicola v. George Hyman Construction Co.*, *supra*. Nor may a general contractor claim immunity under § 905(a) where both he and the subcontractor have purchased compensation coverage for

the injured employee, *Thomas v. George Hyman Construction Co.*, *supra*; *Probst v. Southern Stevedoring Co.*, 379 F.2d 763 (5th Cir. 1967), for in that situation, the coverage purchased by the general contractor merely supplements that required to be purchased by the subcontractor. Since the employee received no *quid pro quo* from the purchase of compensation coverage by the general contractor, the general contractor may not invoke the immunity granted in § 905. *Thomas v. George Hyman Construction Co.*, *supra* at 383.

However, those cases are significantly different from the case before us. Here, by agreement with its subcontractors, the general contractor, WMATA, became the sole purchaser of workmen's compensation coverage; and it was from that coverage that the plaintiff received his benefits. This is precisely the situation left open by the *Probst* court. *Id.* at 767. Unlike the contractors in *Thomas*, *DiNicola* and *Probst*, the general contractor here has given a *quid pro quo* for release from common law liability, since it alone secured compensation coverage. In our view the general contractor here, WMATA, is entitled to immunity from damage suits in return for the purchase of workmen's compensation coverage. See 2A *Larson, Workmen's Compensation Law* § 72.31(a) at 14-112 (1982).

We recognize that there is some case law to the contrary. However, we decline to follow the "extreme" position of courts holding a general contractor liable for common law damages even where he alone purchased the applicable workmen's compensation coverage. See *Id.* § 72.31(c) at 14-135. We agree with Professor Larson that this "extraordinary" position deprives the general contractor of his *quid pro quo*, for he gets "nothing whatever in return" for his purchase of compensation coverage. *Id.* at 14-137.

As a final matter, plaintiff argues that the contractual arrangement between WMATA and its subcontractors

tors, whereby WMATA assumed the obligation to purchase workmen's compensation coverage, is "null and void as against statutory provision and public policy", and therefore neither WMATA nor any of its subcontractors may claim the protection of § 905(a). We do not agree.

Whatever the validity of the contractual arrangement², the fact remains that plaintiff's immediate employer did not purchase workmen's compensation coverage for the plaintiff. Thus, WMATA was never relieved of its obligations, under § 904(a), to secure workmen's compensation coverage for the plaintiff. Since WMATA fulfilled that obligation, we believe that it is entitled to § 905(a)'s grant of immunity. See *Thomas v. George Hyman Construction Co.*, *supra* at 383. ("general contractor may well be free of all other liability if he [alone] in fact carried such insurance.") This position

² Arguably, the contract *may* contemplate a violation of law. Under § 938(a) of the LHWCA, "any employer required to secure" workmen's compensation coverage, who fails to secure such coverage, is guilty of a misdemeanor. Since WMATA's subcontractors were primarily responsible for securing workmen's compensation for their employees, *DiNicola v. George Hyman Construction Co.*, *supra*, their abdication of that responsibility *may* violate § 938(a).

Nevertheless, we do not believe the contractual arrangement violates the public policy. The purpose of the LHWCA is to ensure workmen's compensation coverage for every employee. The WMATA contractual arrangement does just that—it guarantees that each employee will have compensation coverage since WMATA assumed the obligation of securing the coverage.

Nor does the contract limit the rights of a subcontractor's employee. Although an injured employee is barred from suing the general contractor (WMATA), absent the special protection of § 80 of the WMATA Compact (see *f.n. 1 supra*), the subcontractor's employee is free to bring a common law action against his immediate employer under § 905(a). See *Baldwin v. Wrecking Corp. of America*, 484 F.Supp. 185 (W.D.Va. 1979) (Under Virginia's compensation act, an insured employee may sue his employer, a subcontractor, even though he obtained workmen's compensation benefits under the general contractor's workmen's compensation coverage.

12a

is consistent with the holding of at least one other court in this District. *See Eighmey v. Bechtel Associates Professional Corp.*, C.A. No. 81-1261 (D.D.C. July 30, 1982).

Accordingly, it is this 24th day of August, 1982

ORDERED that the motion of the defendant WMATA for summary judgment is hereby GRANTED, and that this action is hereby dismissed as to it.

/s/ Howard F. Corcoran
Judge

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 81-1481

JOHN WARREN CLANAGAN,
Plaintiff,

v.

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY,
Defendant.

[Filed Sep. 2, 1982]

MEMORANDUM OPINION OF UNITED STATES
DISTRICT JUDGE CHARLES R. RICHEY

APPEARANCES

William H. Mulroney, James M. Hanny, and Michele A. Parfitt, *Asocraft & Gerel, Washington, D.C.* for *John Warren Clanagan.*

Vincent H. Cohen and Robert B. Cave, *Hogan & Hartson, Washington, D.C.* for *Washington Metropolitan Area Transit Authority.*

Before the Court is defendants' motion for summary judgment, plaintiff's opposition thereto, and the entire record herein, the Court having heard oral argument by both sides on this matter. Defendant here contends that it is immune from suit because it was obligated to purchase workers' compensation coverage for plaintiff and thus is entitled to the protection of § 905(a) of the Longshoremen's and Harbor Workers' Compensation Action, 33 U.S.C. § 905(a) (1976).¹ Plaintiff argues that de-

¹ This Act has been adopted by the District of Columbia as its workers' compensation law. D.C. Code § 36-501 (1973).

defendant should not be held immune because it was not obligated to purchase compensation coverage for plaintiff and because any arrangement by which defendant may have obtained immunity from this action is null and void as contrary to law. Upon careful consideration of these arguments, the Court holds that this action is barred by § 905(a) and, accordingly, should be dismissed.

FINDINGS OF FACT

Plaintiff in this action seeks damages for injuries sustained while working as a hard rock miner on the Metro subway project. At the time of his injuries, plaintiff worked for subcontractors performing construction services for defendant, the general contractor for the entire subway project. The subcontractors for whom he worked did not obtain workers' compensation insurance applicable to him.

Instead, defendant obtained insurance covering plaintiff. More precisely, the defendant required that all claims by workers on the Metro project be administered through its adjuster, the National Loss Control Service Corporation, and all claims be paid by its carrier, Lumberman's Mutual Casualty Insurance Co. Plaintiff applied for and received workers' compensation benefits for his injuries from defendant's carrier.

CONCLUSIONS OF LAW

I. *DEFENDANT IS IMMUNE BECAUSE IT WAS OBLIGATED TO INSURE PLAINTIFF UNDER § 904(a)*

On both sides, the parties to this action have argued that the entity that was obligated to purchase the workers' compensation coverage for plaintiff is entitled to the immunity under § 905(a). The parties disagree, however, as to who had that obligation—defendant, the general contractor for the Metro project, or the subcontractor.

tor, for whom plaintiff directly worked. On this question, the arguments by both sides rest on language from the same statutory provision, 33 U.S.C. § 904(a), which states:

Every employer shall be liable for and shall secure the payment to his employees of the compensation payable under sections 907, 908, and 909 of this title. In the case of an employer who is a subcontractor, the contractor shall be liable for and shall secure the payment of such compensation to employees of the subcontractor unless the subcontractor has secured such payment.

Plaintiff argues from the first sentence of this provision that the subcontractor, and the subcontractor alone, had the obligation to purchase workers' compensation insurance for its employees. Plaintiff further relies on this sentence to suggest that the arrangement whereby the defendant took on the subcontractor's responsibility of purchasing compensation insurance is contrary to law. Only plaintiff's direct employer, he says, should have obtained the insurance.

Defendant argues from the second sentence of § 904 (a) that it was liable for purchasing workers' compensation for the employees of its subcontractor unless the subcontractor purchased the insurance itself. This sentence, defendant contends, puts the primary obligation on the general contractor, not the subcontractor, to purchase insurance. Defendant further argues that it would have been guilty of a misdemeanor under 33 U.S.C. § 938 (a) had it failed to purchase compensation insurance for plaintiff as it did.

The Court finds that the defendant has proffered the better interpretation. On its face, § 904(a) plainly contemplates that *either* the subcontractor or the general contractor obtain workers' compensation insurance. This language has been part of the Act since it was passed in 1927. See S. 3170, 69th Cong., 2d Sess. § 4, reprinted

at 68 *Cong. Rec.* 5404 (1972). It assures compensation coverage for workers performing for subcontractors: either the subcontractor picks up insurance for these workers or the general contractor must do so. The important thing is that the worker be insured.

Here, plaintiff *was* insured. By arrangement, the contractor and the subcontractor saw to it that there was compensation insurance that covered the plaintiff. Indeed, plaintiff has already received his compensation insurance award! Thus, the goal of the workers' compensation law has already been satisfied. As Congressman Fiorella La Guardia stated at the time of the passage of the Act, workers' compensation seeks to "transfer from society and from the courts the expense of taking care of those injured in industry and transfer it to the industry itself." 68 *Cong. Rec.* 5412 (1927).

The position that plaintiff has urged on this Court is that defendant may be sued at common law even though it obtained the only insurance applicable to plaintiff and paid plaintiff's compensation claim. This position has been characterized as "extreme" by the leading treatise in the area of workers' compensation. See 2A *Larson, Workmen's Compensation Law* § 72.31(c), at 14-135 (1982). While there are courts outside this jurisdiction that have adopted that position, see, e.g., *Fiore v. Royal Painting Co., Inc.*, 398 So. 2d 863 (Fla. App. 1981), this Court declines to do so.

The Court views as without merit plaintiff's contention that the arrangement whereby defendant took on the responsibility for purchasing compensation insurance for its subcontractors' employees is null and void as contrary to law. The difficulty with this argument is that the second sentence of § 904(a) appears to contemplate precisely such arrangements where the subcontractor does not purchase compensation insurance and the general contractor does. Also, as defendant has aptly noted, no

question has previously been raised about the legality of this arrangement, either by the Department of Labor, the administrative agency charged with overseeing such programs, or by plaintiff himself at the time he collected an award under defendant's compensation program.

To be sure, the present case does not present a situation in which the general contractor purchased needless insurance for employees who were already insured by a subcontractor. Thus, the situation here is distinguishable from that presented in *Thomas v. George Hyman Construction Co.*, 173 F. Supp. 81 (D.D.C. 1959) and *DiNicola v. George Hyman Construction Co.*, 407 A.2d 670 (D.C. 1979), cases which have been cited by plaintiff in support of his view. Rather, the two apposite decisions in this jurisdiction support the position proffered by defendant that it should be held immune. See *Johnson v. Bechtel Associates Professional Corporation*, CA No. 81-0963 (D.D.C. Aug. 24, 1982) (Corcoran, J.); *Eighmey v. Bechtel Associates Professional Corporation*, CA No. 81-1261 (D.D.C. July 30, 1982) (Green, J.).

II. PLAINTIFF CAN STILL BRING SUIT AGAINST THE SUBCONTRACTOR WHO EMPLOYED HIM

Although the defendant in this action is immune from suit, the Court is of the opinion that plaintiff still has other remedies at common law, beside the compensation award he has already received. Under 33 U.S.C. § 933, plaintiff is eligible to sue any person "other than the employer or a person in his employ," even though he has elected to receive compensation from defendant. Under District of Columbia law, this provision has been interpreted to allow suits against a general contractor where plaintiff has previously received compensation from his subcontractor employer. See *Liberty Mutual Insurance Co. v. Goode Construction Co.*, 97 F. Supp. 316 (E.D. Va. 1951) (applying D.C. law). The Court sees no reason why, in the present situation where plaintiff received

compensation from the general contractor, a "third-party" suit could not be brought against the subcontractor who has contributed nothing toward plaintiff's compensation. Although this Court has previously dismissed an attempt by Bechtel Associates to bring the subcontractor into this action, plaintiff can still bring an independent action of his own.

One possible obstacle that might be raised to such a suit is the statute of limitations.² However, this Court has already held that the statute of limitations in this action did not begin to run until the date of *discovery* of the injury for which plaintiff seeks relief. *See also Fearson v. Johns Manville Sales Corp.*, 525 F. Supp. 67 (D.D.C. 1981). Plaintiff here did not discover he had pneumoconiosis until June 3, 1981. So, presumably, he has until three years from that date to bring suit against "third-parties" such as the subcontractor for whom he worked. If he wishes relief at common law, that is the course he ought to take.

CONCLUSION

Having found that defendant was obligated by § 904 (a) to purchase insurance applicable to plaintiff, which it did, the Court hold that defendant is immune from suit under § 905 (a).

An Order in accordance with the foregoing shall be issued of even date herewith. Thus, defendant's motion for summary judgment shall be granted and this action against defendant shall be dismissed.

/s/ Charles R. Richey
CHARLES R. RICHEY
United States District Judge
September 3, 1982

² Defendant in this action already raised the issue of statutory bar. However, the Court need not reach the issue here because of its holding under § 905 (a).

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 81-1125

CALVIN WALKER, *et ux.*,
Plaintiff,
v.

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY,
Defendant.

[Filed Sep. 2, 1982]

ORDER

For the reasons stated in the memorandum opinion accompanying this Court's order in *Clanagan v. Washington Metropolitan Area Transit Authority*, Civil Action No. 81-1481, of even date herewith, it is, by the Court, this 2d day of September, 1982,

ORDERED that defendant's motion for summary judgment is granted, and it is

FURTHER ORDERED that this action is dismissed without prejudice to the bringing of an entirely new action by plaintiff against the subcontractor for whom he worked.

/s/ Charles R. Richey
CHARLES R. RICHEY
United States District Judge

APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 82-0999

GLENWOOD WILLIAMS,

Plaintiff,

v.

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY,
Defendant.

[Filed Oct. 6, 1982]

MEMORANDUM AND JUDGMENT

This matter is before the court for resolution of defendant WMATA's motion for summary judgment. Defendant WMATA has moved for summary judgment on two main grounds: 1) plaintiff's cause of action is barred by the applicable statute of limitations, and 2) plaintiff's cause of action is barred by certain provisions of the District of Columbia Workmen's Compensation statute. In support of the second prong of its motion, WMATA has referred this court to two recent decisions of this district court which basically hold that WMATA's mandatory purchase of workmen's compensation insurance for its employees entitles it to immunity from personal injury suits by those same employees. *See Johnson v. Bechtel Associates, et al.*, No. 81-0963 (D.D.C. August 24, 1982); *Eighmey v. Bechtel Associates, et al.*, No. 81-1261 (D.D.C. July 30, 1982). Plaintiff has cited one case from a Florida state appellate court which holds to the contrary. *See Fiore v. Royal Painting Company, Inc.*, 398 So.2d 863 (Fla. App. April 23, 1981). After considering the materials submitted on this motion, together with the arguments of counsel, this court believes that

it must follow the recent decisions made by other members of this district. The opinions of Judge Corcoran and Judge Green appear both well-supported and well-reasoned. This being so, the court need not discuss any of WMATA's alternative arguments and summary judgment must now be entered for defendant WMATA in this case.

On the basis of the foregoing, it is, by the court, this 5th day of October, 1982,

ORDERED ADJUDGED and DECREED that defendant WMATA's motion for summary judgment is hereby granted.

/s/ Thomas A. Flannery
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 82-0999

GLENWOOD WILLIAMS,

Plaintiff,

v.

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY,
Defendant.

[Filed Oct. 6, 1982]

JUDGMENT

It is, by the court, this 6th day of October, 1982,

ORDERED, ADJUDGED and DECREED that defendant WMATA's motion for summary judgment shall be, and hereby is, granted.

/s/ Thomas A. Flannery
United States District Judge

APPENDIX F

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 81-3057

JAMES H. BUCHANAN, *et al.*,
Plaintiffs

v.

BECHTEL ASSOCIATES
PROFESSIONAL CORPORATION, D.C., *et al.*,
Defendants

[Filed Nov. 19, 1982]

MEMORANDUM

James and Shirley Buchanan bring this action against Bechtel Civil and Minerals, Inc., Bechtel Associates Professional Corporation, D.C., (Bechtel, collectively) and the Washington Metropolitan Area Transit Authority (WMATA) for damages allegedly resulting from lung injuries James Buchanan received during his employment at various WMATA construction sites. The action is before the Court on WMATA's motion for summary judgment.

James Buchanan began working as a hard rock miner on WMATA construction projects beginning in 1978. On September 27, 1979, Mr. Buchanan filed a workmen's compensation claim for damages due to lung injuries allegedly caused by his work at the construction sites. On December 14, 1981, plaintiffs filed this judicial action against Bechtel for damages resulting from the same lung injuries. On July 7, 1982, the Court allowed plaintiffs to file an amended complaint which added WMATA as a defendant. WMATA is now the only defendant in

this action because on July 28, 1982, the Court granted Bechtel's motion for summary judgment, due to Bechtel's immunity from suit under the WMATA compact.

WMATA has moved for summary judgment on two grounds. WMATA contends that this action was not commenced within the statutory time limit and, alternatively, claims that this action is precluded by the applicable workmen's compensation statute. The Court will not address the statute of limitations issue because plaintiffs' suit against WMATA is clearly barred by the workmen's compensation provisions.

The federal Longshoremen's and Harbor Worker's Compensation Act (the Act), 33 U.S.C. § 901-950, contains the controlling workmen's compensation provisions for this action. See D.C. Code § 36-501 to § 36-502 (1973). Under the Act each employer in the District of Columbia is required to purchase workmen's compensation insurance to cover his employees. The employer is compensated for providing such coverage by a grant of immunity from civil suits for damages resulting from employment. See 33 U.S.C. § 904-905; *DiNicola v. George Hyman Construction Co.*, 407 A.2d 670 (D.C. 1979). General contractors are required to provide coverage for the employees of subcontractors "unless the subcontractor has secured such payment." 33 U.S.C. § 904 (1976). WMATA claims that it is immune from suits for damages to employees such as Mr. Buchanan because WMATA purchased the workmen's compensation coverage which protects the employees of its subcontractors.

The precise issue of whether WMATA is immune from suits brought to recover damages incurred by employees of metrorail construction firms has been presented to this District Court four times previously. In all four cases WMATA was granted summary judgment on the grounds that § 905 of the Act protected WMATA from such suits. See *Eighmey v. Bechtel Associates Professional*

Corporation, D.C., et al., No. 81-1261 (D.D.C. July 30, 1982) (order granting summary judgment fpr [sic] WMATA); *Johnson v. Bechtel Associates Professional Corporation, D.C., et al.*, No. 81-0963 (D.D.C. August 24, 1982) (order granting summary judgment); *Clanagan v. Washington Metropolitan Area Transit Authority*, No. 81-1481 (D.D.C. Sept. 2, 1982) (order dismissing WMATA); *Williams v. Washington Area Transit Authority*, No. 82-0999 (D.D.C. Oct. 6, 1982) (order granting summary judgment). These four cases, before four separate judges of this Court, persuasively establish tht [sic] WMATA is entitled to immunity from suits of the type brought by plaintiffs.

Accordingly, WMATA's motion for summary judgment is granted. Since no defendant remains, this action is dismissed.

/s/ John Louis Smith, Jr.
United States District Judge

Dated: November 19, 1982

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 81-8057

JAMES H. BUCHANAN, *et al.*,
Plaintiffs

v.

BECHTEL ASSOCIATES
PROFESSIONAL CORPORATION, D.C., *et al.*,
Defendants

[Filed Nov. 19, 1982]

ORDER

Upon consideration of defendant Washington Metropolitan Area Transit Authority's motion for summary judgment, plaintiffs' opposition thereto, oral argument by counsel and the entire record, it is by the Court this 19th day of November 1982

ORDERED that defendant's motion for summary judgment is granted and this action is dismissed.

/s/ John Louis Smith, Jr.
United States District Judge

APPENDIX G

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 81-0114

STANLEY WILMES,

Plaintiff,

v.

WMATA,

Defendant.

[Filed Dec. 16, 1982]

MEMORANDUM

This matter comes before the court on the motion of defendant for summary judgment and on the motion of plaintiff to amend his complaint to add as defendants the subcontractors involved in the construction of the Washington subway. For the reasons set forth below, defendant's motion for summary judgment shall be granted, and plaintiff's motion to amend his complaint shall be denied.

A. Summary Judgment

In support of its motion WMATA argues that plaintiff's claim is barred by § 905(a) of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 905(a) (1976), which has been adopted as the Worker's Compensation statute of the District of Columbia, D.C. Code § 36-501 (1973).

Three other judges of this court facing precisely the same question have all held that Section 905(a) provides WMATA with immunity from suit because of its purchase of worker's compensation insurance. *See Clanagan v. WMATA*, No. 81-1481 (D.D.C. Sept. 2, 1982); *Johnson*

v. *Bechtel Associates, et al.*, No. 81-0963 (D.D.C. Aug. 24, 1982), *Eighmey v. Bechtel Associates, et al.*, No. 81-1261 (D.D.C. July 30, 1982). In a Memorandum and Judgment of October 5, 1982, in the case of *Williams v. WMATA*, No. 82-0999, this court, presented with the same question, decided to follow the well-reasoned decisions noted above by the other members of this court.¹

In an attempt to circumvent this statutory bar, plaintiff in this case filed a Supplemental Opposition² contending that WMATA was not entitled to statutory immunity because it was not in fact the general contractor. "In support of its argument plaintiff submitted copies of contracts, between WMATA and construction companies responsible for construction of parts of the subway system, in which the construction companies, not WMATA, were referred to as "contractor."

The verbal gymnastics of plaintiff's counsel have already been rejected by two other judges of this court. See *Buchanan v. Bechtel Associates Professional Corp.*, No. 81-3057 (D.D.C. Nov. 19, 1982); *Johnson v. Bechtel Associates Professional Corp.*, No. 81-0963 (D.D.C. Nov. 19, 1982). Under the WMATA Compact WMATA clearly fulfills the function of overall general contractor of the rapid transit system and, as purchaser of worker's

¹ In the instant case this court, in a Memorandum and Order of October 9, 1982, decided to hold in abeyance its action on defendant's motion and to order supplemental briefing on the question of whether plaintiff's motion to amend would be barred by the statute of limitations.

² In those cases cited above where the court had already granted summary judgment for WMATA plaintiff's counsel, also counsel in those actions, filed motions for reconsideration under Fed. R. Civ. P. 60(b) (3) alleging that WMATA had fraudulently misrepresented itself as general contractor.

In *Williams v. WMATA*, *supra*, plaintiff's counsel filed a motion for reconsideration under Fed. R. Civ. P. 59 one day after this court granted summary judgment for WMATA.

compensation insurance, is entitled to statutory immunity from suit. The court sees no reason to depart from its course of following the decisions of the other members of this court. Defendant's motion for summary judgment shall be granted.

B. Motion to Amend

In a further attempt to preserve some claim plaintiff now seeks to add WMATA's subcontractors as defendants. In a Memorandum and Order dated October 19, 1982, this court noted that the parties in their first filings on this motion did not address the issue raised by the possible bar of the statute of limitations to plaintiff's motion. If a complaint as amended would be barred by the statute of limitations, a court may deny the motion to amend. *Sackett v. Beaman*, 399 F.2d 884, 892 (9th Cir. 1968).

Plaintiff discovered his illness in January 1978. Any amendment adding the subcontractors today would be barred by the three-year statute of limitations of D.C. Code § 12-301 unless the amendment related back to the date of the original complaint. Fed. R. Civ. P. 15 provides that an amendment seeking to add a party may relate back if the party to be added, within the time provided by law for the commencement of the action, had received notice of the institution of the action and knew or should have known that but for a mistake concerning the identity of the proper party, the action would have been brought against him. Plaintiff has failed to meet either of the requirements of Rule 15, advancing instead the unsupported argument that the subcontractors should be estopped from asserting the bar of the statute of limitations because they lulled plaintiff into inaction by misrepresenting themselves as being plaintiff's statutory employers and thus immune from suit. Plaintiff, or rather plaintiff's counsel, may not now try to blame others for their strategic miscalculations or misunder-

standing of the law. Plaintiff's motion to amend must be denied.

An appropriate Judgment and Order accompanies this Memorandum.

/s/ Thomas A. Flannery
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 81-0114

STANLEY WILMES,

Plaintiff,

v.

WMATA,

Defendant.

[Filed Dec. 16, 1982]

JUDGMENT AND ORDER

This matter is before the court on the motion of defendant for summary judgment and on the motion of plaintiff for leave to amend his complaint. Upon consideration of the motions, and the oppositions thereto, as well as the entire record in this case, and after oral argument, for the reasons set forth in the accompanying Memorandum, it is, by the court this 16th day of December, 1982, hereby

ORDERED, ADJUDGED and DECREED that defendant's motion for summary judgment is granted; and it is further

ORDERED that plaintiff's motion to amend his complaint is denied; and it is further

ORDERED that plaintiff's action shall be, and hereby is, dismissed.

/s/ Thomas A. Flannery
United States District Judge

APPENDIX H

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 81-1261

Judge June L. Green

HOWARD L. EIGHMEY, *et al.*,
v. *Plaintiffs,*

BECHTEL ASSOCIATES
PROFESSIONAL CORPORATION, D.C., *et al.*,
Defendants.

[Filed Sep. 13, 1982]

ORDER

This matter came before the Court on the plaintiff's Motion for Reconsideration. Having considered the motion and the defendant Washington Metropolitan Area Transit Authority's opposition thereto, the Court this 10th day of September, 1982:

ORDERS: that the plaintiff's Motion to Reconsider be, and the same hereby is, DENIED.

/s/ June L. Green
United States District Judge

Copies to:

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APPENDIX I

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 81-963

PAUL D. JOHNSON,
Plaintiff,

v.

BECHTEL ASSOCIATES
PROFESSIONAL CORPORATION, D.C., *et al.,*
Defendants.

[Filed Nov. 22, 1982]

ORDER

This matter is before the Court on plaintiff's motion for relief from judgment, pursuant to Rule 60(b)(3) of the Federal Rules of Civil Procedure. On consideration of the motion, the memorandum in support thereof, defendant's opposition thereto, plaintiff's reply to the opposition and the entire record herein, the Court finds that the allegations of "fraud, misrepresentation or misconduct" are not supported by the record and are without merit. It is, accordingly, this 19th day of November, 1982.

ORDERED that plaintiff's motion for relief under Rule 60(b)(3) be, and the same is, hereby DENIED; and it is

FURTHER ORDERED that plaintiff shall pay reasonable costs, including attorneys fees, incurred by the defendant in opposing this motion. Counsel for defendant shall submit an affidavit of costs within 10 days of the entry of this Order.

/s/ John Louis Smith, Jr.
Judge

APPENDIX J

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 81-1481

JOHN CLANAGAN,

v.

Plaintiff

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY,
Defendant.

Civil Action No. 82-1125

CALVIN WALKER, *et ux.*,

v.

Plaintiffs

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY,
Defendant.

[Filed Dec. 9, 1982]

ORDER

Before the Court are plaintiffs' motions for relief pursuant to Rule 60(b)(3), defendant's oppositions thereto, and the entire records herein. For the reasons stated in Judge Corcoran's order of November 19, 1982 in *Johnson v. Bechtel Associates Professional Corporation*, No. 81-963 (D.D.C. 1982), it is, by the Court, this 3 day of December, 1982,

ORDERED, that plaintiffs' motions are denied, and it is

FURTHER ORDERED, that plaintiffs shall pay reasonable costs, including attorneys' fees, incurred by the defendant in opposing these motions.

/s/ Charles R. Richey
CHARLES R. RICHEY
United States District Judge

APPENDIX K

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

Civil Action No. 81-1261

HOWARD L. EIGHMEY, *et al.*,
Plaintiffs

v.

BECHTEL ASSOCIATES
PROFESSIONAL CORPORATION, D.C., *et al.*,
Defendants

[Filed Dec. 10, 1982]

ORDER

Upon consideration of plaintiffs' motion for relief under Rule 60(b)(3) from the judgment of this Court in favor of defendant Washington Metropolitan Area Transit Authority, defendant's opposition, plaintiffs' reply, defendant's response, and the entire record in this action, the Court finds that plaintiffs' allegations of fraud, misrepresentation or other misconduct are not supported by the record. Accordingly, it is by the Court this 10th day of December 1982,

ORDERED that plaintiffs' motion for relief under Rule 60(b)(3) of the Federal Rules of Civil Procedure is denied.

/s/ June L. Green
JUNE L. GREEN
U.S. District Judge

APPENDIX L

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 82-999

GLENWOOD WILLIAMS,
Plaintiff,

v.

WMATA,
Defendant.

[Filed Dec. 16, 1982]

ORDER

This matter comes before the court on plaintiff's motion for reconsideration of this court's memorandum and judgment of October 5, 1982, granting defendant's motion for summary judgment.

For the reasons set forth in this court's recent memorandum in *Wilmes v. WMATA*, No. 81-0114 (D.D.C. Dec. 16, 1982) plaintiff's motion is denied.

/s/ Thomas A. Flannery
United States District Judge

37a

APPENDIX M

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 82-2017

PAUL D. JOHNSON,
Appellant
v.

BECHTEL ASSOCIATES
PROFESSIONAL CORPORATION, D.C., *et al.*

No. 82-1784

HOWARD L. EIGHMEY, ET AL.,
Appellants
v.

BECHTEL CIVIL AND MINERALS, INC., *et al.*

No. 82-1809

CALVIN WALKER, *et al.*,
Appellants
v.

BECHTEL CIVIL AND MINERALS, INC., *et al.*

No. 82-1813

JOHN WARREN CLANAGAN,
Appellant
v.

BECHTEL ASSOCIATES
PROFESSIONAL CORPORATION, D.C., *et al.*

38a

No. 82-1899

PAUL D. JOHNSON,

Appellant

v.

BECHTEL ASSOCIATES
PROFESSIONAL CORPORATION, D.C., *et al.*

No. 82-2062

CALVIN WALKER and RENA WALKER,

Appellants

v.

BECHTEL ASSOCIATES
PROFESSIONAL CORPORATION, D.C., *et al.*

No. 82-2063

JOHN WARREN CLANAGAN,

Appellant

v.

BECHTEL ASSOCIATES
PROFESSIONAL CORPORATION, D.C., *et al.*

No. 82-2148

HOWARD L. EIGHMEY, *et al.*,

Appellants

v.

BECHTEL ASSOCIATES
PROFESSIONAL CORPORATION, D.C., *et al.*

39a

No. 82-2374

STANLEY WILMES,

Appellant

v.

BECHTEL ASSOCIATES

PROFESSIONAL CORPORATION, D.C., *et al.*

No. 82-2458

PAUL D. JOHNSON,

Appellant

v.

BECHTEL ASSOCIATES

PROFESSIONAL CORPORATION, D.C., *et al.*

No. 82-2459

JAMES H. BUCHANAN and SHIRLEY BUCHANAN, his wife,
Appellants

v.

BECHTEL ASSOCIATES

PROFESSIONAL CORPORATION, D.C., *et al.*

No. 82-2525

STANLEY WILMES,

Appellant

v.

BECHTEL ASSOCIATES

PROFESSIONAL CORPORATION, D.C., *et al.*

40a

No. 82-2529

CALVIN WALKER, *et al.*,
Appellants

v.

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY

No. 82-2530

JOHN WARREN CLANAGAN,
Appellant

v.

BECHTEL ASSOCIATES
PROFESSIONAL CORPORATION, D.C., *et al.*

No. 82-2531

HOWARD L. EIGHMEY, *et al.*,
Appellants

v.

WASHINGTON METROPOLITAN AREA
TRANSIT AUTHORITY, *et al.*

No. 83-1008

GLENWOOD WILLIAMS,
Appellant

v.

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY

Appeals from the United States District Court
for the District of Columbia

(D.C. Civil Action Nos. 81-00963, 81-01261, 81-01125,
81-01481, 81-00114, 81-03057 and 82-00999)

Argued March 28, 1983

Decided August 19, 1983

Peter J. Vangsnes and *William F. Mulroney*, with whom *James M. Hanny* and *Michelle A. Partiff* were on the brief, for appellants. *Michael H. Feldman*, also entered an appearance for appellants.

Gary W. Brown, with whom *James F. Bromley*, *James W. Greene*, *William G. Schaefer* and *Ronald Flagg* were on the brief, for appellees, *Bechtel Associates Professional Corporation, et al.* *Catherine H. Lesica* and *Elaine L. Johnston*, also entered appearances for appellees, *Bechtel Associates Professional Corporation, et al.*

Vincent H. Cohen, with whom *Robert B. Cave* was on the brief, for appellee, *Washington Metropolitan Area Transit Authority*.

Robert L. Ellis, *Edward J. Lopata*, *J. Joseph Barse*, *F. Wainwright Barnes*, and *Laurence T. Scott* were on the joint brief of amici curiae, *Metro Subway Construction Contractor/Employers*.

Before: ROBINSON, *Chief Judge*, WRIGHT, *Circuit Judge* and MACKINNON, *Senior Circuit Judge*.

Opinion for the Court filed by *Senior Circuit Judge MACKINNON*.

MACKINNON, *Senior Circuit Judge*: These consolidated appeals¹ arise from negligence actions instituted by em-

¹ Because of the similarity of issues in the numerous actions growing out of the WMATA construction, the court ordered these appeals consolidated and expedited. *Johnson v. Bechtel Assoc. Prof. Corp.*, No. 82-2017 (D.C. Cir. Jan. 7, 1983).

ployees of contractors who performed underground work on the Washington Metropolitan Area Transit subway project (Metro). With the exception of Eighmey who was injured in a construction accident, the appellants allegedly sustained respiratory injuries as a result of exposure to high levels of silica dust and other industrial pollutants in the subway project. The injured employees all filed workmen's compensation claims and received compensation awards. The employees then instituted third-party negligence actions against either the Washington Metropolitan Area Transit Authority (WMATA or the Authority)² or Bechtel,³ the safety engineer for the project.

Because of the nature of the contractual relationship between the parties, WMATA or Bechtel appeared to be a proper third-party defendant. WMATA exercises the ultimate control of and authority for the construction and operation of the subway system. WMATA contracted with Bechtel to provide safety engineering services. Contracts for the actual construction work were awarded to a variety of subcontractors. Appellants were employees of these subcontractors.

In the district court each defendant, WMATA or Bechtel, moved for and was granted summary judgment.

² The Washington Area Metropolitan Transit Authority (WMATA or the Authority) is a legal entity created by and deriving its authority from an interstate compact (Compact) entered into by Maryland, Virginia, and the District of Columbia with the consent of Congress. U.S. CONST. art. I, § 10, cl. 3. WMATA was formed to develop and operate a transit system (Metro) in the District of Columbia metropolitan area. Pub. L. No. 89-774, 80 Stat. 1324 (1966) (codified at D.C. Code § 1-2431 (1981)). The Authority may sue and be sued. Compact § 12.

³ Two Bechtel entities were sued in the district court actions, Bechtel Civil and Minerals, Inc., a Nevada corporation, and its local affiliate, Bechtel Associates Professional Corporation. The two corporations are indistinguishable for the purposes of these appeals and therefore will both be referred to simply as "Bechtel."

Appellants contest these judgments and present four issues for our resolution. We discuss each issue separately and conclude:

(1) Bechtel was an agent of WMATA and therefore, under section 80 of the Compact, WMATA is exclusively liable for Bechtel's torts. Accordingly we affirm the grant of summary judgment to Bechtel on this issue.

(2) WMATA is not entitled to the immunity accorded to employers under section 905(a) of the Longshoremen's Act. Accordingly we reverse the grant of summary judgment to WMATA on this issue.

(3) A more complete factual record is necessary to determine whether, under FED. R. CIV. P. 15(c), WMATA was properly added as a defendant. Accordingly we remand these cases.

(4) Under section 33(b) of the Longshoremen's Act an injured employee cannot institute a third-party negligence action after the expiration of the six-month period following acceptance of a compensation award. Accordingly we affirm the dismissal of the *Williams* case.

I. SECTION 80 OF THE WMATA COMPACT

Defendant Bechtel based its motion for summary judgment upon section 80 of the WMATA Compact.⁴ Section 80 establishes WMATA's contract and tort liability and provides:

The Authority shall be liable for its contracts and for its torts and those of its Directors, officers, employees and agent committed in the conduct of any proprietary function, in accordance with the law of the applicable signatory (including rules on conflict of laws), but shall not be liable for any torts occurring in the performance of a governmental func-

⁴ See note 2 *supra*.

tion. The exclusive remedy for such breach of contracts and torts for which the Authority shall be liable, as herein provided, shall be by suit against the Authority. Nothing contained in this Title shall be construed as a waiver by the District of Columbia, Maryland, Virginia and the counties and cities within the Zone of any immunity from suit.

Bechtel asserted that it functioned as an "agent" of WMATA when performing its safety duties, and was therefore entitled to immunity from negligence actions by operation of section 80 of the Compact. Bechtel argued that WMATA was exclusively liable for any work-related tortious injury suffered by the employees. Each district court which considered this issue found that Bechtel was an agent of WMATA within the meaning of section 80 and granted summary judgment.⁵ We affirm the judgments of the district courts on this issue.

A. *Legal Standard*

While conceding that, in its role as safety engineer, Bechtel was an agent of WMATA within the "broadest terms," appellants nevertheless assert that the term "agent" in section 80 of the Compact should be given a narrow construction. Appellants attempt to remove Bechtel from the operation of section 80 by arguing that Bechtel was an "independent contractor"-agent and, therefore, not within the class of "servant"-agents for whom a principal is vicariously liable. However, this attempted distinction, based primarily upon the Restatement (Second) of Agency (1958), fails because resolu-

⁵ Appellants challenge the grant of summary judgment on the section 80 issue in the following cases: *Johnaon v. Bechtel Assoc. Prof. Corp.*, No. 81-0963 (D.D.C. July 21, 1982); *Walker v. Bechtel Civil and Minerals, Inc.*, No. 81-1125 (D.D.C. July 8, 1982); *Clanagan v. Bechtel Assoc. Prof. Corp.*, No. 81-1481 (D.D.C. July 8, 1982); *Eighmey v. Bechtel Civil and Minerals*, No. 81-1261 (D.D.C. June 21, 1982).

tion of this issue turns on the use of the word "agent" within a statute expressly designed to shift liability exclusively to the principal, WMATA.⁶ While resort to the Restatement may be informative, it is not dispositive; instead, we look to the statute itself.

The use of the word "agent" in section 80 is unqualified⁷ and there is no reason, under these circumstances,

⁶ Appellants' reliance on the Restatement is misplaced. While the Restatement does distinguish between "servants" and "independent contractors" for some purposes, it also makes clear that both "servants" and "independent contractors" may be agents. Restatement (Second) of Agency § 2 (1958).

Section 251 of the Restatement, applied to the situation herein, obviates the need for any distinction between "servants" and "independent contractors" or "non-servant agents."

§ 251. Liability for Physical Harm Caused by a Servant or a Non-servant Agent

A principal is subject to liability for physical harm to the person . . . of another caused by the negligence of a servant or a non-servant agent:

(a) in the performance of an act which the principal is under a duty to have performed with care . . .

Restatement (Second) of Agency § 251 (1958).

WMATA, the principal, had a duty to protect workers from physical harm caused by the construction of Metro. By entrusting the performance of that duty to an agent (Bechtel), WMATA is liable for any harm caused by its agent's negligence, regardless of whether the agent was a servant or an independent contractor. See Restatement (Second) of Agency § 251 comment (a) (1958).

⁷ Appellants suggest that the legislative history of the Compact reveals that the term "agent" was intended to have an extremely narrow meaning. The only "legislative history" cited by appellants is a Senate Judiciary Committee Staff paper which, appellants purport, explains the purpose of section 80.

Liability for Contracts and Torts

(Article XVI sec. 80)

This would make the Authority [WMATA] liable for its contracts and torts and the torts of its *personnel* (emphasis added) committed in the conduct of any *proprietary* function,

for distinguishing between "independent contractors" who are agents and "servants" who are agents. Guided by accepted rules of statutory construction and noting that there is no indication that the drafters of the Compact intended to use "agent" in a restrictive manner, we accord the term its common and usual meaning. *Diamond v. Diehr*, 450 U.S. 175, 182 (1981) ("Unless otherwise defined, 'words will be interpreted as taking their ordinary, contemporary, common meaning,' *Perrin v. United States*, 444 U.S. 37, 42 (1979) . . .").

An agent is one who is authorized by another (principal) to act on his behalf. An agent-principal relationship is characterized by the presence of two elements. First, there must be an indication by the principal that the agent will act on his behalf and subject to his control. And second, there must be a manifestation of consent by the agent so to act. Restatement (Second) of Agency § 1 (1958); *Rose v. Silver*, 394 A.2d 1368 (D.C. App. 1978). *Accord Lott v. Burning Tree Club, Inc.*, 516 F. Supp. 913, 917 (D.D.C. 1980) (Police are not agents of Country Club because not designated as such and Club exercised no control over the police.). The extent of control and consent is evidenced both by the terms of the contract and by the actual dealings between the parties.

in accordance with the law of the applicable signatory (including rules on conflict of laws). It would absolve the Authority from liability for torts occurring in the performance of a governmental function, and provides that this section would not constitute a waiver by any of the signatories or their sub-jurisdictions of any immunity from suit.

Ludolph Brief at 22.

Based upon this statement, appellants argue that the intent of section 80 was to immunize only *individuals* acting as agents and not "large corporate entities such as Bechtel." This argument is not persuasive. The "legislative history" relied upon is little more than a loose restatement of the statute. Without more, such statements cannot serve to narrow the meaning of an unambiguous statutory term.

Applying the foregoing legal standards, we examine the contract between Bechtel and WMATA and the actual on-the-job practice.

B. *The WMATA-Bechtel Relationship*

WMATA contracted with Bechtel to administer the safety program on the entire subway construction project.⁸ Taken as a whole, the contract provides that Bechtel shall act on behalf of and subject to the authority of WMATA. Numerous provisions of the contract specify the exact nature and extent of control which WMATA exercises over Bechtel. For example, Paragraph 1 of the Scope of Services portion of the WMATA-Bechtel contract provides:

The [WMATA] Contracting Officer shall be kept fully informed of all operations under this contract and [Bechtel] shall have authority to conduct these operations for and in the name of the Authority [WMATA], subject to the approval of the [WMATA] contracting officer.

Article XVI of the General Provisions section of the Contract provides:

The extent and character of the work to be done by [Bechtel] shall be subject to the general supervision, direction, control and approval of the [WMATA] Contracting Officer and the authorized representative of the Contracting Officer to whom [Bechtel] shall report and be responsible.

In addition to specifying the general working relationship, the WMATA-Bechtel contract provides that all

⁸ The annual contracts executed by WMATA and Bechtel from 1971 until the present did not change significantly from year-to-year. The relevant portions of these contracts are exhibits in the district court record in *Johnson v. Bechtel Assoc. Prof. Corp.*, No. 81-0963, and all references to the contracts are to the district court record.

personnel hired by Bechtel for the WMATA project must be approved by WMATA. General Provisions, Art. IX. The salaries of these employees are also subject to approval by WMATA. Special Provisions, Sec. III. Once WMATA approves a Bechtel employee to serve as an on-site Resident Engineer, Bechtel cannot transfer, re-assign, or fire him without the Authority's approval.⁹

The allocation of authority and responsibility between WMATA and Bechtel is further specified in the Co-ordinated Safety Program & Reporting Procedures Manual which is specifically incorporated into the WMATA-Bechtel contract. The Safety Manual provides that a full-time WMATA employee, the Contracting Officer, has primary responsibility for overseeing the safety-related aspects of the project. Another WMATA official, the Safety Engineer, is charged with evaluating and directing the activities of the Bechtel Safety Department. Taken as a whole, the WMATA-Bechtel contract provides for extensive and pervasive control by WMATA over Bechtel personnel.

The actual day-to-day work performed by Bechtel on the construction sites reinforces the conclusion that Bechtel serves as WMATA's agent.¹⁰ On the job site the Resident Engineer, a Bechtel employee, represents WMATA and is responsible for ensuring that the various contractors comply with WMATA safety regulations. In the discharge of his duties, Bechtel's Resident Engineer is subject to the direction of the WMATA Contracting Officer from whom he receives both written and verbal in-

⁹ At a hearing conducted by the district court in *Johnson v. Bechtel Assoc. Prof. Corp.*, No. 81-0963, on May 17, 1982, John S. Egbert, Assistant General Manager for Design and Construction for WMATA (Contracting Officer), testified to the working relationship between WMATA, Bechtel, and the subcontractors. The relevant testimony is contained in Appellees Record Excerpts 22-23, 31, and 51.

¹⁰ See note 9 *supra*.

structions. Although the Resident Engineer is authorized to direct correction of safety violations, in practice he rarely takes any major action without first consulting WMATA. The Resident Engineers carry business cards identifying them as "Authorized Representative[s] of the Contracting Officer," i.e., WMATA. In their daily work, the Bechtel safety personnel are subject to the direction of WMATA officials and function essentially as WMATA employees.

C. Conclusion

It is unimportant whether the WMATA-Bechtel relationship was a master/servant agency relationship or a principal/independent contractor agency relationship. "Agent," as used in the Compact, is unqualified and, therefore, embraces both types of agency relationships.

To determine if a party is an "agent" within the broadest meaning of the term, the court looks to the entirety of the relationship for evidence of *consent* between the parties to establish a principal-agent relationship and for evidence of the degree of *control* exercised by the principal. The district courts correctly concluded that both mutual consent and a sufficient degree of control were present in the WMATA-Bechtel relationship to establish that Bechtel acted as an agent of WMATA. By the terms of section 80 of the Compact, therefore, WMATA is exclusively liable for the torts of its agent, Bechtel. We affirm the grant of summary judgment to Bechtel on this issue.

II. SECTION 905 OF THE LONGSHOREMEN'S AND HARBOR WORKER'S COMPENSATION ACT

At the time of their alleged injuries, the appellants were employed by construction companies under contract to WMATA to construct specific segments of the Metro project. These subcontractors did not purchase workmen's

compensation insurance for their employees; instead WMATA purchased such insurance to cover all laborers and other employees working on the Metro system. After sustaining an injury, each employee filed for and received workmen's compensation benefits. Exercising their statutory right to sue a third-party tortfeasor, several of the injured employees instituted an action against WMATA.

WMATA responded with a motion for summary judgment, asserting that because it obtained and paid for the workmen's compensation insurance required by section 904(a)¹¹ of the Longshoremen's and Harbor Workers' Compensation Act (the Act), 33 U.S.C. § 901 *et seq.* (1976 & Supp. V 1981),¹² it was entitled to the statutory immunity accorded to an "employer" under section 905(a).¹³ Each federal district court which considered this question granted summary judgment in favor of WMATA.¹⁴ We reverse.

¹¹ The Act, 33 U.S.C. § 904(a) (1976), provides:

(a) Every employer shall be liable for and shall secure the payment to his employees of the compensation payable under sections 907, 908 and 909 of this title. In the case of an employer who is a subcontractor, the contractor shall be liable for and shall secure the payment of such compensation to the employees of the subcontractor unless the subcontractor has secured such payment.

¹² The District of Columbia Workers' Compensation Act, D.C. Code § 36-501 *et seq.* (1973), adopted the provisions of the federal Longshoremen's and Harbor Workers' Compensation Act. For simplicity, the Act will be referred to by the federal statute section numbers.

¹³ 33 U.S.C. § 905(a) (1976) provides:

(a) The liability of an employer prescribed in section 904 of this title shall be exclusive and in place of all other liability of such employer to the employee

¹⁴ Appellants challenge the grant of summary judgment on the section 905(a) issue in the following cases: *Wilmes v. Washington Metropolitan Area Transit Auth.*, No. 81-0114 (D.D.C. Dec. 18,

In reaching their decisions, the district courts relied exclusively upon the fact that WMATA furnished the workmen's compensation insurance, accepting the argument that section 904(a) employer immunity is a *quid pro quo* for providing such insurance. The courts premised their *quid pro quo* conclusion upon the assumption that WMATA was *legally required* to purchase the compensation insurance. A closer analysis of the language and purpose to the Act and the relevant case law leads to the conclusion that in these circumstances WMATA was not *required* to provide the compensation insurance. Furthermore, the voluntary provision of such insurance does not entitle the provider to the statutory employer immunity of section 905(a).

To analyze the intended operation of the compensation insurance provisions, one must begin with the overall purpose and design of the Longshoremen's Act. As this court acknowledged in *Potomac Electric Power v. Wynn*, 343 F.2d 295, 296 (D.C. Cir. 1965) (footnote omitted):

The Longshoremen's and Harbor Workers' Compensation Act must be construed liberally in favor of the injured employee. Narrow statutory construction should not deprive the injured employee of either his compensation or his claim in damages against third parties.

This overriding purpose underlies our interpretation of sections 904 and 905 of the Act.

The Act is designed to insure that all employees are covered by worker's compensation insurance and will

1982); *Buchanan v. Bechtel Assoc. Prof. Corp.*, No. 81-3067 (D.D.C. Nov. 19, 1982); *Williams v. Washington Area Metropolitan Transit Auth.*, No. 82-0999 (D.D.C. Oct. 6, 1982); *Clanagan v. Washington Metropolitan Area Transit Auth.*, No. 81-1481 (D.D.C. Sept. 2, 1982); *Walker v. Washington Metropolitan Area Transit Auth.*, No. 81-1125 (D.D.C. Sept. 2, 1982); *Johnson v. Bechtel Assoc. Prof. Corp.*, No. 81-0963 (D.D.C. Aug. 24, 1982); *Highway v. Bechtel Assoc. Prof. Corp.*, No. 81-1261 (D.D.C. July 30, 1982).

thereby receive prompt compensation for work-related injuries. To assure the availability of compensation, employers are required to carry insurance. 33 U.S.C. § 932 (1976). Failure to do so may result in criminal sanctions. *Id.* § 938. In return for carrying the required insurance, an employer is absolved from all other liability, even if the employee's injury is attributable to employer negligence. *Id.* § 905. In the scheme of the Act, not only is the employee entitled to prompt compensation payments, but he also retains the right to sue any third party whose negligence may have caused or contributed to his injuries. *Id.* § 933. When a job involves a general contractor and subcontractors, the Act requires the subcontractor to obtain the workmen's compensation insurance. *Id.* § 904. The general contractor is not obligated to obtain insurance "unless" the subcontractor fails to do so. *Id.*

While the Act does not expressly designate who obtains section 905 employer immunity when a general contractor and subcontractor are involved, courts have allowed a general contractor to invoke the statutory immunity *only* when he was *legally required to*, and did in fact, provide workmen's compensation insurance. When both the general contractor and the subcontractor carry workmen's compensation insurance, courts have held that *only* the subcontractor is entitled to statutory immunity. The general contractor is denied section 905(a) immunity because he is not *statutorily* required to carry insurance. *Thomas v. George Hyman Const. Co.*, 173 F. Supp. 381 (D.D.C. 1959). *Accord DiNicola v. George Hyman Const. Co.*, 407 A.2d 670, 674 (D.C. App. 1979) ("[T]he Longshoremen's Act[] impose[s] on the general contractor the duty to secure compensation insurance *only* if the subcontractor has failed to do so."); *Probst v. Southern Stevedoring Co.*, 379 F.2d 763, 766 (5th Cir. 1967) ("[T]he structure of §§ 904, 905 . . . add up to show that the provision imposing on the general contractor compen-

sation liability to an employee of a subcontractor is a secondary, protective one."').¹⁵

A fundamental premise of the compensation insurance scheme is that the general contractor's statutory duty to secure workmen's compensation insurance is *secondary*. "The general contractor has a *secondary, guaranty-like liability*." *Probst, supra*, 379 F.2d at 767 (emphasis added). The subcontractor is primarily and initially responsible; the general contractor becomes responsible *only*

¹⁵ *Probst* expressly reserved

the question of what ought to be done if the general contractor, or general employer, is actually *required* to pay compensation benefits to the injured employee of the subcontractor under § 904.

379 F.2d at 767 (footnote omitted) (emphasis added). However, the question left open in *Probst* is not the precise issue herein. WMATA was not "required" to obtain workmen's compensation insurance under section 904. WMATA *voluntarily* assumed that responsibility.

The fact that WMATA voluntarily obtained compensation insurance also distinguishes the WMATA case from *Fiore v. Royal Painting Co.*, 398 So. 2d 863 (Fla. Dist. Ct. App. 1981). In *Fiore*, the subcontractor's insurance *lapsed* unbeknownst to the general contractor. Following the work-related death of an employee of the subcontractor, the general contractor paid direct benefits to the decedent's widow and children. In a subsequent wrongful death action, the defendant-contractor moved for and obtained summary judgment based upon section 905(a) employer immunity.

Reversing the grant of summary judgment on appeal, the *Fiore* court held that the general contractor was not entitled to statutory immunity. The court rejected the general contractor's *quid pro quo* argument and construed the Act to allow immunity only to the "actual employer (in this type of situation, a *complying* subcontractor)." *Id.* at 865. The *Fiore* court denied statutory immunity to the general contractor, notwithstanding the fact that his subcontractor had defaulted and the general contractor had in fact assumed his obligation under the statute. *Fiore* represents an extreme interpretation of the Act and is distinguishable on its facts.

upon the subcontractor's default. As the court stated in *Thomas v. George Hyman, supra*, 173 F. Supp. at 383:

The law does not accord to the general contractor the choice of either carrying workmen's compensation insurance, or subjecting himself to liability for negligence. The law requires him to carry insurance *only if the subcontractor fails to do so*. In such a contingency, the general contractor may well be free of all other liability if he in fact carried such insurance. He may not, however, *voluntarily* take out insurance that the law does not require and thereby secure freedom from liability for negligence. . . . Release from common law liability is a benefit accruing from carrying compensation insurance only in case the law imposes a duty to do so. One may not escape from such liability by taking out insurance that the law does not require.

(Emphasis added). This interpretation clearly comports with the plain language of sections 904 and 905, as well as with the overall statutory scheme.

By initially providing the insurance for all employees, WMATA pre-empted the subcontractors' statutory duty to secure such insurance. The language and scheme of the Act, as well as the relevant caselaw, clearly establish that a general contractor may not circumvent the intended operation of the Act by, in effect, choosing between either securing workmen's compensation insurance and thereby obtaining statutory employer immunity, or remaining potentially liable as a third-party tortfeasor. To accord WMATA section 905 employer immunity would frustrate the operation of the Act. WMATA cannot unilaterally decide to purchase the workmen's compensation insurance itself and thereby obtain section 905 immunity. To benefit from securing the insurance, WMATA must *first* require its subcontractors to purchase the insurance. It is only by providing compensation insurance

when the subcontractors fail to do so that WMATA obtains immunity as a statutory employer.

WMATA suggests that its circumstance is analogous to the situation wherein the subcontractor fails to obtain insurance or the subcontractor's insurance lapses. In such instances, the statute provides that the general contractor then becomes responsible for assuring that workmen's compensation insurance is provided. However, WMATA's circumstance is not analogous. WMATA did not follow the statutory scheme; instead it pre-empted the proper functioning of the scheme. WMATA, the general contractor, *initially* provided the workmen's compensation insurance when it was under *no legal duty* to do so; the Authority thereby supplanted its subcontractors' primary, statutory duty.

WMATA attempts to justify its actions by explaining that its wrap-up insurance plan was "the only effective way to ensure that all employees would be covered by compensation insurance at all times." WMATA Reply Brief at 27. WMATA contends that after attempting to require all subcontractors to provide workmen's compensation insurance, it found the task impossible to administer. Therefore, after 1971 WMATA instituted a "coordinated insurance plan" whereby it purchased workmen's compensation insurance for all employees of all subcontractors. Although WMATA asserts that it was primarily concerned with fulfilling its section 904 duty, the Authority also reveals that the wrap-up insurance program "substantially lessen[ed] [its] administrative burden and effectuat[ed] a substantial savings in costs." WMATA Reply Brief at 27-28. That it was more convenient and cost effective to carry the insurance does not excuse deviation from the statutory scheme. Nor does the size of the project affect the intended operation of the statutory provisions. WMATA had no statutory duty to provide insurance until and unless a subcontractor failed in its primary obligation to provide such insurance.

The problems caused by WMATA's deviation from the statutory scheme are evident in these cases. To the injured employees it appeared that their respective employers provided the workmen's compensation insurance. Therefore, when compensation claims were filed and paid, the employees reasonably assumed that under section 905(a) of the Act their immediate employer could not be sued for negligence. Consequently, the employees attempted to exercise their statutory right to a third-party action by instituting suit against WMATA. Only then did it become clear who had actually secured and paid for the compensation insurance. For some employees this discovery came too late to institute suit against their immediate employer who might have been a third-party defendant if WMATA was entitled to section 905 employer immunity. The net effect of this scenario was to confuse and confound the injured employee whom the Act was designed to protect. With the statute of limitations running on his third-party claim, it was unclear to the injured employee which entity, if not both, would be entitled to employer immunity.

The language and purpose of sections 904(a) and 905(a) of the Longshoremen's and Harbor Workers' Compensation Act, as well as the relevant case law, compels the conclusion that WMATA be denied statutory employer immunity.¹⁶ The Act clearly contemplates that an injured employee can receive compensation benefits and have the right to bring a third-party action. We will not immunize a potential third-party defendant when the only basis for so doing rewards that party for circumventing the statutory scheme. Notwithstanding the fact that it provided the workmen's compensation insurance, WMATA is amenable to suit as a potentially liable third-party

¹⁶ We express no opinion on the issue whether the subcontractors have "secure[d]" compensation insurance under section 904(a) and would thereby be entitled to immunity.

tortfeasor. The grants of summary judgment to WMATA are reversed.

III. RULE 15(c) OF THE FEDERAL RULES OF CIVIL PROCEDURE

In four of the seven actions on appeal, the employees first sued Bechtel and subsequently added WMATA as a defendant by amending their complaint¹⁷ pursuant to Rule 15(c) of the Federal Rules of Civil Procedure.¹⁸ In each instance, WMATA moved for summary judgment on two alternative grounds. First, WMATA asserted that

¹⁷ In the following cases the district courts allowed the plaintiff to amend his complaint to add WMATA as a defendant: *Johnson v. Bechtel Assoc. Prof. Corp.*, No. 81-0963 (D.D.C. May 18, 1982); *Buchanan v. Bechtel Assoc. Prof. Corp.*, No. 81-3057 (D.D.C. July 7, 1982); *Clanagan v. Washington Metropolitan Area Transit Auth.*, No. 81-1481 (D.D.C. July 8, 1982); *Wilmes v. Washington Metropolitan Area Transit Auth.*, No. 81-0114 (D.D.C. July 13, 1982).

In *Wilmes*, the plaintiff also sought to amend his complaint via Rule 15(c) to add the subcontractors as defendants. The district court denied plaintiff's motion to amend. *Wilmes v. Washington Metropolitan Area Transit Auth.*, No. 81-0114 (D.D.C. Dec. 16, 1982). *Wilmes* appeals this denial and for the reasons stated in this section of our opinion, we remand this aspect of the case also. A more complete factual record is a prerequisite for review of a Rule 15(c) decision.

¹⁸ Rule 15(c) of the Federal Rule of Civil Procedure provides:

(c) Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against him, the party to be brought in by amendment (1) has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him.

it was not a proper defendant because the requisites of Rule 15(c) were not satisfied. Second, WMATA argued that under section 905(a) of the Longshoremen's Act it was immune from suit as a statutory employer. In each case the district court granted summary judgment for WMATA on the section 905(a) ground and expressly declined to address the Rule 15(c) issue.¹⁹ WMATA seeks to justify the grant of summary judgment in its favor by reurging the contention that it was not properly added as a defendant.

Rule 15(c) permits an amendment adding a party to relate back to the date of the original pleading if three conditions are met: (1) the claims against the new party must arise out of the same occurrence as the claims in the original pleading; (2) the new party must have received "notice of the institution of the action" before the limitations period expired; and (3) the new party must know "or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him." *Norton v. International Harvester Co.*, 627 F.2d 18, 20 (7th Cir. 1980); *Hernandez Jimenez v. Calero Toledo*, 604 F.2d 99, 102-03 (1st Cir. 1979). To permit the addition of a party via a Rule 15(c) amendment, the court must be satisfied that all three tests are met.

WMATA argues that two of the Rule 15(c) criteria were not satisfied and, therefore, that it was improperly made a defendant. First, WMATA notes that the amended complaints adding it as a defendant were filed after the statute of limitations on the underlying tort had run. While Rule 15(c) removes a statute of limita-

¹⁹ *Johnson v. Bechtel Assoc. Prof. Corp.*, No. 81-0963, slip op. at 1 (D.D.C. Aug. 24, 1982); *Clanagan v. Washington Metropolitan Area Transit Auth.*, No. 81-1481, slip op. at 6 n.2 (D.D.C. Sept. 3, 1982); *Buchanan v. Bechtel Assoc. Prof. Corp.*, No. 81-3067, slip op. at 2 (D.D.C. Nov. 19, 1982); *Wilmes v. Washington Metropolitan Area Transit Auth.*, No. 81-0114 (D.D.C. 16, 1982).

tions bar by allowing the amended complaint to "relate back" to the date of the original filing, the party to be added must have received sufficient "notice" of the action so that it is not prejudiced in maintaining a defense. WMATA contends, *inter alia*, that it received notice only upon the actual filing of the amended complaint and that because that filing was made after the expiration of the statute of limitations, such notice is *per se* insufficient. Plaintiffs-appellees counter that because of the "identity of interests" between WMATA and Bechtel, WMATA received constructive notice prior to the expiration of the statutory period. In addition, plaintiffs-appellees assert that WMATA has not been prejudiced by receiving such belated notice. WMATA also contends that the "mistake" requirement of Rule 15(c) was not satisfied because the plaintiffs did not initially make a "mistake" regarding the proper party to be sued, but rather made a tactical decision to sue Bechtel. Plaintiffs-appellees assert that they did in fact make a reasonable legal "mistake" in choosing the original defendant.

Because resolution of these issues in the context of a Rule 15(c) decision involves inherently factual determinations, a complete factual record is required. *McCurry v. Allen*, 688 F.2d 581, 585 (8th Cir. 1982) (Remanded for an evidentiary hearing and findings of fact because "[t]he requirements of Rule 15(c) raise factual issues not susceptible to determination at the appellate level."); *Ringrose v. Engelberg Huller Co.*, 692 F.2d 403 (6th Cir. 1982). Furthermore, on the motion for summary judgment each district court expressly declined to reach the Rule 15(c) issue. This court will not, therefore, resolve this issue notwithstanding the fact that it has been briefed and argued. We express no opinion on the resolution of this issue, leaving the matter in the first instance to the district courts. The cases are remanded for the development of an adequate factual record and a ruling by the district courts on the propriety of adding WMATA as a defendant by a Rule 15(c) amendment.

IV. SECTION 933(b) OF THE LONGSHOREMEN'S AND HARBOR WORKERS' ACT

On August 28, 1981, appellant Williams received a lump-sum workmen's compensation award. More than six months later, on April 1, 1982, Williams instituted a third-party negligence action against WMATA. The district court dismissed Williams' action because it was not filed within the six-month statutory period as provided in 33 U.S.C. § 933(b).²⁰ *Williams v. Washington Metropolitan Area Transit Auth.*, No. 82-0999 (D.D.C. Oct. 6, 1982). Williams challenges the district court's dismissal of his action and attempts to excuse his delay in instituting suit by relying upon the so-called "*Czaplicki* exception," fashioned by the Supreme Court in *Czaplicki v. The Hoegh Silvercloud*, 351 U.S. 525 (1956).

In *Czaplicki*, an injured employee accepted a workmen's compensation award which, under the statute as it existed then, effected an automatic assignment of his third-party claims to his employer. In turn, his employer's insurer was subrogated to the employer's rights. Seven years after receiving the compensation award, when no third-party action had been filed, *Czaplicki* instituted a negligence action against several potentially liable third-parties. *Czaplicki's* employer and one of the third-party defendants were insured by the same company, Travelers Insurance Company. Recognizing that the substantial conflict of interests inherent in this circumstance made it extremely unlikely that the insurer would proceed against this third-party, the *Czaplicki* Court held that section 33

²⁰ Section 33(b) of the Longshoremen's Act, 33 U.S.C. § 933(b) (1976), provides:

Acceptance of such compensation under an award in a compensation order filed by the deputy commissioner or Board shall operate as an assignment to the employer of all right of the person entitled to compensation to recover damages against such third person unless such person shall commence an action against such third person within six months after such award.

(b) did not prevent the employee from pursuing his third-party action. The Court reasoned that in order to insure that a party with sufficient adversarial interests remained to institute a third-party action, the employee would be permitted to maintain his action, notwithstanding the fact that he had accepted an award of compensation. The *Czaplicki* Court found it significant that there was "no other procedure by which [the employee could] secure his statutory share in the proceeds, if any, of his right of action." *Id.* at 532-83.

In 1959, after *Czaplicki*, Congress amended the relevant provisions of the Act to their present form by eliminating the election requirement under subsection (a), postponing assignment of the claim under subsection (b) until six months after acceptance of a compensation award, and allowing the assignee to retain twenty percent of any excess recovery as a financial incentive to pursue a third-party action. Act of August 18, 1959, Pub. L. No. 86-171, 73 Stat. 391. Under the statute as amended, an injured employee is not required to elect between receiving a workmen's compensation award and seeking damages from a third party. 33 U.S.C. § 933(a). The employee may accept a compensation award and, as long as he acts within six months, institute an action against any potentially liable third party. If, however, he fails to institute suit within six months, acceptance of the compensation award acts as an assignment to the employer of any and all third-party claims which the employee might have. *Id.* § 933(b). The insurer of the employer continues to be subrogated to all rights of the employer. *Id.* § 933(h).

Following amendment of the Act, the Supreme Court held, in *Rodriguez v. Compass Shipping Co.*, 451 U.S. 596 (1981), that failure to institute a third-party action within the statutory six-month period was an absolute bar to a subsequent action by the employee. Although *Rodriguez* did not involve a *Czaplicki* conflict-of-interest and the Court expressly declined to reach the *Czaplicki*

scenario,²¹ the opinion for the Court cast serious doubt upon the viability of the *Czaplicki* conflict-of-interest exception. The *Rodriguez* Court was careful to confine *Czaplicki* to the "peculiar facts" of that case and emphasized the importance of the intervening amendments in alleviating the hardship which existed in the *Czaplicki* circumstance. The Court stated:

[T]he 1959 and 1972 Amendments have substantially undercut the basis for the *Czaplicki* exception to § 33(b). The Court was troubled in *Czaplicki* because under the Act in 1956 there was "no other procedure" by which a longshoreman could enforce his rights against a third party where the employer failed to sue due to a conflict of interest. 351 U.S., at 532-533. After the 1959 amendments, there is such a procedure: the employee may simply file his own third-party suit within six months after accepting compensation.

Rodriguez, supra, 451 U.S. at 617 n.41. Relying upon the express statutory language, the *Rodriguez* Court emphasized the mandatory nature of the assignment which occurs after the six-month period. "Congress unequivocally made the choice in favor of first giving the employee exclusive control of the cause of action for a 6-month period and then giving the employer exclusive control thereafter, instead of opting for any form of simultaneous joint or partial control." *Id.* at 612. Finally, the Court reasoned that the legislative history "forecloses the argument that Congress did not intend an assignment of a third-party

²¹ In a footnote the *Rodriguez* Court stated:

Whether the statutory language [section 33(b)] provides the exclusive solution for unusual conflict-of-interest problems, such as that identified in *Czaplicki*, is a question that is not presented on the facts of these cases. We accordingly do not decide whether, or to what extent, *Czaplicki* survived the 1959 amendments.

claim to be effective unless there was an absence of any potential conflict of interest between the assignee and the [employee]." *Id.*

Considering *Czaplicki*, *Rodriguez*, and the the statute as it exists today, we conclude that the *Czaplicki* exception no longer permits an employee to institute a third-party action after the six-month statutory window.²² Given the statutory language and legislative history relied upon by the *Rodriguez* Court, it is apparent that reading a *Czaplicki* exception into the section 33(b) assignment scheme would frustrate the balance struck by Congress between the employer's and employee's interests. That balance alleviates the hardship which *Czaplicki* was crafted to remedy. Acceptance of a compensation award no longer automatically assigns the employee's third-party claims to his employer. Where the employee suspects a potential *Czaplicki* conflict-of-interest he has six months after accepting a compensation award within which to institute suit himself.

For the foregoing reasons, we do not think that the *Czaplicki* exception survived the post-*Czaplicki* amendment of the Act and *Rodriguez*. Plaintiffs who accept compensation awards must comply with section 33(b) and institute any third-party claims within six months of accepting such award. Because Williams failed to institute his action within the statutory time frame the district court properly dismissed the action. The fact that both parties were insured by the same compensation car-

²² Our decision is in accord with an earlier decision by a panel of this court, *Phillippi v. Bechtel Assoc. Prof. Corp.*, No. 82-1615 (D.C. Cir. Feb. 24, 1983), and with two unpublished memorandum opinions by district courts in this Circuit, *Phillippi v. Bechtel Assoc. Prof. Corp.*, No. 81-1154 (D.D.C. April 28, 1982) and *Jenkins v. Bechtel Assoc. Prof. Corp.*, No. 81-2236 (D.D.C. Feb. 23, 1982). The District of Columbia Court of Appeals has also recently repudiated the conflict-of-interest exception. *Thomas Westbrook v. Hutchinson Crane Ecavating [sic] Co.*, No. 82-1151 (D.C. App. June 30, 1983).

rier does not excuse the plaintiff's delay in instituting his third-party claim. The judgment of the district court is affirmed.

V. CONCLUSION

The Clerk is directed to issue judgments in the respective cases in accordance with the foregoing opinion.

APPENDIX N
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

September Term, 1983

Civil Action No. 81-00963

No. 82-2017

PAUL D. JOHNSON,

v.

Appellant

BECHTEL ASSOCIATES
PROFESSIONAL CORPORATION, D.C., *et al.*,
Appellees

And Consolidated Cases

[Filed Oct, 3, 1983]

Before: Robinson, Chief Judge; Wright, Circuit Judge,
and MacKinnon, Senior Circuit Judge

ORDER

On consideration of Appellee Washington Metropolitan
Area Transit Authority's Petition for Rehearing, filed
September 2, 1983, it is

ORDERED by the Court that the aforesaid Petition is
denied.

Per Curiam

For the Court:

GEORGE A. FISHER
Clerk

By: /s/ Robert A. Bonner
ROBERT A. BONNER
Chief Deputy Clerk

APPENDIX O
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

September Term, 1983
Civil Action No. 81-00963
No. 82-2017

PAUL D. JOHNSON,

v.

Appellant

BECHTEL ASSOCIATES
PROFESSIONAL CORPORATION, D.C., *et al.*,
Appellees

And Consolidated Cases

[Filed Oct. 3, 1983]

Before: Robinson, Chief Judge; Wright, Tamm, Wilkey,
Wald, Mikva, Edwards, Ginsburg, Bork and
Scalia, Circuit Judges, and MacKinnon, Senior
Circuit Judge

ORDER

The Suggestion for Rehearing *en banc* of Appellee Washington Metropolitan Area Transit Authority, filed September 2, 1983 has been circulated to the full Court and no member has requested the taking of a vote thereon. On consideration of the foregoing, it is

ORDERED by the Court *en banc* that the aforesaid Suggestion is denied.

Per Curiam

For the Court:

GEORGE A. FISHER
Clerk

By: /s/ Robert A. Bonner
ROBERT A. BONNER
Chief Deputy Clerk

Circuit Judge Wald did not participate in this order.

APPENDIX P

**UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

September Term, 1983

Civil Action No. 81-00963

No. 82-2017

PAUL D. JOHNSON,

v.

Appellant

BECHTEL ASSOCIATES

PROFESSIONAL CORPORATION, D.C., *et al.*

And Consolidated Cases

[Filed Oct. 19, 1983]

Before: Robinson, Chief Judge, Wright, Circuit Judge
and MacKinnon, Senior Circuit Judge

ORDER

On consideration of the motion of Appellee WMATA for stay of mandate pending application for certiorari, it is

ORDERED by the Court that the motion is granted and the Clerk is directed to withhold issuance of the mandate of this Court to and including November 7, 1983.

For The Court:

GEORGE A. FISHER
Clerk

By: /s/ Robert A. Bonner
ROBERT A. BONNER
Chief Deputy Clerk

MAR 1 1984

ALEXANDER L. STEVAS.
CLERK

No. 83-747

IN THE
Supreme Court of the United States
OCTOBER TERM, 1983

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY,
Petitioner,
v.

PAUL D. JOHNSON, *et al.*,
Respondents.

On Writ of Certiorari to the United States
Court of Appeals for the District of Columbia Circuit

JOINT APPENDIX

E. BARRETT PRETTYMAN, JR.*
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Dated: March 1, 1984

PETITION FOR CERTIORARI FILED NOVEMBER 4, 1983
CERTIORARI GRANTED JANUARY 16, 1984

IN THE
Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-747

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY,
Petitioner,

v.

PAUL D. JOHNSON, *et al.*,
Respondents.

On Writ of Certiorari to the United States
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JOINT APPENDIX

INDEX

	Page
Docket entries from the United States District Court for the District of Columbia and from the United States Court of Appeals for the District of Columbia Circuit	1
Affidavit of David L. Sewall, Filed on June 21, 1982 in <i>Johnson v. Bechtel Associates Professional Corp.</i> , <i>D.C., et al.</i> , C.A. No. 81-0963	23
Affidavit of Delmer Ison, Filed on June 21, 1982 in <i>Johnson v. Bechtel Associates Professional Corp.</i> , <i>D.C., et al.</i> , C.A. No. 81-0963	25
Affidavit of Delmer Ison Filed on August 5, 1982 in <i>Williams v. Washington Metropolitan Area Transit Authority</i> , C.A. No. 82-0999	27

INDEX—Continued

	Page
Affidavit of David L. Sewall Filed on August 5, 1982 in <i>Williams v. Washington Metropolitan Area Transit Authority</i> , C.A. No. 82-0999	29
Affidavit of Delmer Ison Filed on August 12, 1982 in <i>Clanagan v. Bechtel Associates Professional Corp., D.C., et al.</i> , C.A. No. 81-1481	31
Affidavit of David L. Sewall Filed on August 12, 1982 in <i>Clanagan v. Bechtel Associates Professional Corp., D.C., et al.</i> , C.A. No. 81-1481	33
Affidavit of Delmer Ison Filed on August 13, 1982 in <i>Walker v. Bechtel Associates Professional Corp., D.C., et al.</i> , C.A. No. 81-1125	35
Affidavit of David L. Sewall Filed on August 13, 1982 in <i>Walker v. Bechtel Associates Professional Corp., D.C., et al.</i> , C.A. No. 81-1125	37
Affidavit of Delmer Ison Filed on August 20, 1982 in <i>Wilmes v. Bechtel Civil and Minerals, Inc., D.C., et al., C.A. No. 81-0114</i>	39
Affidavit of David L. Sewall Filed on August 20, 1982 in <i>Wilmes v. Bechtel Civil and Minerals, Inc., D.C., et al., C.A. No. 81-0114</i>	41
Affidavit of Delmer Ison Filed on September 14, 1982 in <i>Buchanan v. Bechtel Civil and Minerals, Inc., et al., C.A. No. 81-3057</i>	43
Affidavit of David L. Sewall Filed on September 14, 1982 in <i>Buchanan v. Bechtel Civil and Minerals, Inc., et al.</i> , C.A. No. 81-3057	45
Department of Labor, Office of Workmen's Compensa- tion Program Joint Petition for Approval of Settlement Agreement Filed on Behalf of John W. <i>Clanagan</i>	47
Department of Labor, Office of Workmen's Compensa- tion Program Joint Petition for Approval of Settle- ment Agreement Filed on Behalf of Calvin Walker....	50

III

INDEX—Continued

	Page
Department of Labor, Office of Workmen's Compensation Program 8(i) (A) Compensation Order Filed on Behalf of Glenwood Williams	53
Department of Labor, Office of Workmen's Compensation Program 8(i) (A) Compensation Order Filed on Behalf of Paul Johnson	55
Department of Labor, Office of Workmen's Compensation Program 8(i) (A) Compensation Order Filed on Behalf of Howard L. Eighmey	60
Workmen's Compensation Claim of Stanley Wilmes	64
Workmen's Compensation Claim of James Buchanan....	66
Guidelines for Improved Rapid Transit Tunneling Safety and Environmental Impact, Volume 1 (January 1977)	68
Agreement Among Washington Metropolitan Area Transit Authority, Lumbermens Mutual Casualty Company and National Loss Control Service Corporation	79
Washington Metropolitan Area Transit Authority Insurance Specifications for Construction Projects	102
Washington Metropolitan Area Transit Authority Coordinated Safety Program and Reporting Procedures Manual	132
Washington Metropolitan Area Transit Authority Department of Design and Construction Manual	162
Washington Metropolitan Area Transit Authority General Provisions and Standard Specifications for Construction Projects, (1973) (selected provisions)	185
NATLSCO's List of Contractors Covered by the Coordinated Insurance Program	219
Washington Metropolitan Area Transit Authority and Ball-Healy-Granite Construction Contract for A6(b) Site	222

INDEX—Continued

	Page
Certificate of Insurance issued by Lumbermens Mutual Casualty Company to WMATA with Gordon H. Ball, Inc., as Named Insured	225
Deposition of Delmer Ison	227
Deposition of David L. Sewall	305
Order of the Supreme Court Allowing Certiorari, dated January 16, 1984	332
NOTE: The appendix filed in support of the petition for certiorari contains the following material, which is omitted from this Joint Appendix:	
APPENDICES A through G: District Court Decisions Granting WMATA's Motions for Summary Judgment	1a
APPENDICES H through L: District Court Decisions Denying Plaintiffs' Motions for Post-Judgment Relief	32a
APPENDIX M: Court of Appeals' Decision	37a
APPENDIX N: Court of Appeals' Decision Denying Petition for Rehearing	65a
APPENDIX O: Court of Appeals' Decision Denying Suggestion for Rehearing En Banc	66a
APPENDIX P: Court of Appeals' Order Staying Issuance of Mandate	67a

**CHRONOLOGICAL LIST OF
RELEVANT DOCKET ENTRIES
FROM THE COURTS BELOW**

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

C.A. No. 81-0963

JOHNSON

v.

BECHTEL ASSOCIATES PROFESSIONAL CORPORATION,
D.C., *et al.*,

DATE	NR.	PROCEEDINGS
1981		
Apr. 22	1	COMPLAINT; jury demand; appearance.
May 21	2	ANSWERS of defendants Bechtel Associates Professional Corporation, D.C. and Bechtel Civil and Minerals, Inc. to the complaint.
1982		
May 13	51	MOTION by plaintiff for leave to file an amended complaint adding an additional party defendant and amending allegations of Count II; Exhibit A.
May 19	53	ORDER filed 5-18-82 granting motion of plaintiff for leave to file an amended complaint. (N)
May 19	54	AMENDED COMPLAINT by plaintiff.
May 20	56	ANSWER of defendant WMATA to the amended complaint.
June 21	62	MOTION by defendant WMATA for summary judgment; Exhibits A; Attachments A&B; Exhibit B.
July 09	74	OPPOSITION by plaintiff to defendant WMATA's motion for summary judgment.
July 26	83	REPLY by defendant WMATA in support of its motion for summary judgment; Exhibit C.

DATE	NR.	PROCEEDINGS
Aug. 25	89	MEMORANDUM and ORDER filed 8-24-82 granting motion of the defendant WMATA for summary judgment, and this action is dismissed as to WMATA. (N) CORCORAN, J.
Aug. 31	90	NOTICE OF APPEAL by plaintiff from order of 8-24-82.
Aug. 31		COPIES of Notice of Appeal and docket entries transmitted to USCA. USCA No. 82-2017.
Sept. 14	91	MOTION by plaintiff to supplement the record, attachment.
Oct. 01	95	ORDER filed 9-30-82 granting plaintiff's motion for leave to supplement the record on appeal and directing Clerk to transmit a copy of the Specifications of the Coordinated Insurance Program of the WMATA (Nov. 1973 edition) to the USDC., Exhibit. (N) CORCORAN, J.
Oct. 27	99	MOTION by plaintiff for relief under Rule 60(b) (3) from the judgment of this Court in favor of defendant WMATA; Exhibits 1-7.
Nov. 09	101	OPPOSITION by defendant WMATA to the plaintiff's Rule 60(b) (3) motion for relief; Exhibits A, B and C.
Nov. 23	103	ORDER filed 11-22-82 denying plaintiff's motion for relief from judgment; plaintiff shall pay reasonable costs including attorneys' fees incurred by defendant in opposing this motion. Defendant shall submit an affidavit of costs within 10 days. (N) CORCORAN, J.
Nov. 29	107	COPY OF ORDER from USCA dated 11-9-82 holding case No. 82-2017 and consolidated cases in abeyance, and further briefing deferred pending the ruling of the District Court on appellants' motion for relief under Rule 60 (b) (3).

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 82-2017

JOHNSON, *et al.*

v.

BECHTEL ASSOCIATES PROFESSIONAL CORPORATION,
D.C., *et al.*

DATE	PROCEEDINGS
1982	
Sept. 01	Copy of notice of appeal and docket entries from Clerk, District Court (n-3).
Sept. 01	Docketing fee was paid in the District Court on 08-31-82.
Oct. 05	Certified Original Record (1 vol.) containing remaining papers (also the record in 82-1899) (n-3).
Oct. 19	Clerk's order, sua sponte, that the above cases 82-1740, et al., 82-2017, 82-2062, 82-2063 and 82-2148 are consolidated.
Nov. 09	Clerk's order that case No. 82-2017 and consolidated cases are held in abeyance and further briefing deferred pending the ruling of the District Court on appellants' Motion for Relief under Rule 60(b) (3); and that within ten (10) days of the entry of the District Court's order in said motion, appellants submit an appropriate motion to this Court either requesting a remand or proposing a new briefing schedule; and that if District Court has not ruled on said motion within thirty (30) days of the date of this order, appellants submit a status report to this Court.

DATE	PROCEEDINGS
1983	
Jan. 04	Appellants' motion for further consolidation of Nos. 82-2525, 83-1003, 82-2459, 82-2384, 82-2250, 82-2258, 82-2529, 82-2530, 82-2531 and proposal of a briefing schedule (m-4).
Jan. 07	Per Curiam order that the above case Nos. 82-2374, 82-2458, 82-2459, 82-2525, 82-2529, 82-2530, 82-2531, 83-1003 are consolidated with Nos. 82-2017 and consolidated cases; (2) these cases, Nos. 82-2017 and consolidated cases are expedited and shall be scheduled for oral argument during the March 1983 sitting period of the Court. The following briefing schedule is established; Appellee Bechtel's Brief—01/14/83; Appellants' Reply to Bechtel's Brief 01/24/83; Appellants' Brief on WMATA issues—01/25/83; Appellee WMATA's Brief 02/25/83; Appellants' Reply to WMATA's Brief—03/07/83; (3) All future filings in these consolidated appeals shall refer to No. 82-2017, Paul D. Johnson v. Bechtel Associates Professional Corporation, D.C., et al., and consolidated cases, which has been established as the lead docket; and (4) Nos. 82-2250 and 82-2384 shall not be consolidated with No. 82-2017 and consolidated cases at this time due to pending orders to show cause why the notices of appeals should not be dismissed; Tamm (who did not participate), Wald and Scalia, CJs.
Jan. 14	15-Appellees' (Bechtel) brief (p-14).
Jan. 14	7-Appellees' (Bechtel) record excerpts (p-14).
Jan. 24	15-Appellants' reply brief (m-24).
Jan. 25	15-Appellants' brief (m-25).
Jan. 25	10-Appellants' record excerpts (m-25).
Feb. 25	25-Appellee's (WMATA) brief (p-25).
Feb. 25	25-Appellee's (WMATA) record excerpts (p-25).

DATE	PROCEEDINGS
March 07	15-Appellants' reply brief (m-7).
March 16	15-Appellee's (WMATA) supplemental brief (m-16).
March 22	4-Joint Motion of Certain Metro Subway Construction Contractor/Employers for leave to file a joint brief as amici curiae (p. 22).
March 24	4-Appellee's (WMATA) opposition to the joint motion for leave to file a joint brief as amici curiae (p. 24).
March 28	ARGUED before CJ Robinson: and Wright, CJ. At the outset, the Court announced the Circuit Judge MacKinnon is a member of this panel, but is unable to be present. He will participate in the decision on the record, briefs and tape recording.
June 20	Per curiam order that the joint motion of certain Metro Subway Construction Contractor/Employers for leave to file joint brief as amici curiae is granted and the Clerk is directed to file the lodged brief amici curiae; and sua sponte, that leave is granted to the other parties to respond to the brief amici curiae within 15 days of the date of this order, if they so choose; CJ Robinson, Wright, CJ and SCJ Mackinnon.
June 20	15-Joint amici curiae (p-22)—certain Metro Subway Construction Contractor/Employers.
June 28	4-Transcript of oral argument.
July 05	15-Appellee's (WMATA) second supplemental brief (m-5).
July 05	15-Appellee's (WMATA) reply brief to joint amici curiae's brief (m-5).
August 19	Opinion for the Court filed by Senior Circuit Judge MacKinnon.
August 19	Mandate order.

DATE	PROCEEDINGS
Sept. 02	15-Appellee's (WMATA) petition for rehearing and suggestion for rehearing en banc (m-2).
Oct. 03	Per curiam order that appellee Washington Metropolitan Area Transit Authority's petition for rehearing, filed 09/02/83, is denied; CJ Robinson, Wright, CJ and SCJ MacKinnon.
Oct. 03	Per curiam order, en banc, that the suggestion for rehearing en banc of appellee WMATA is denied; CJ Robinson, Wright, Tamm, Wilkey, Wald, Mikva, Edwards, Ginsburg, Bork and Scalia, CJs and SCJ MacKinnon (Circuit Judge Wald did not participate in this order).
Nov. 15	Notice from Clerk, Supreme Court that petition for writ of certiorari was filed on 11-04-83 in SC No. 83-747.
Nov. 15	Certified certificate that petition for writ of certiorari was filed on 11/04/83 in SC No. 83-747.
1984	
Jan. 17	Clerk's order that the Clerk of the District Court recertify and retransmit to this Court the records on appeal for further transmission to the Supreme Court.
Jan. 18	Certified copy of order from Clerk, Supreme Court granting petition for writ of certiorari in SC No. 83-747 on 01-16-84.
Jan. 18	Letter dated 01-17-84 from Clerk, Supreme Court asking that record be certified and transmitted to Supreme Court.
Jan. 18	CERTIFIED ORIGINAL RECORD (3 vols.) 2 reporters transcripts—pursuant to 01-17-84 order.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

C.A. No. 81-3057

BUCHANAN

v.

BECHTEL CIVIL AND MINERALS, INC., *et al.*

DATE	NR.	PROCEEDINGS
1981		
Dec. 14	1	COMPLAINT; appearance.
Jan. 19	2	ANSWERS by defendants to complaint; jury demand.
1982		
May 13	19	MOTION by plaintiffs for leave to file an amended complaint adding an additional party defendant.
July 06	31	ORDER granting plaintiffs' motion for leave to file an amended complaint and defendants shall have 15 days from the date of this order within which to answer the amended complaint. (N) SMITH, J.
July 06	32	AMENDED COMPLAINT by plaintiffs.
Aug. 25	37	ANSWER of defendant WMATA to amended complaint.
Sept. 14	39	MOTION by WMATA for summary judgment; Exhibits A-L.
Oct. 07	45	OPPOSITION by plaintiffs to defendant WMATA's motion for summary judgment.
Oct. 14	46	REPLY by defendant WMATA in support of motion for summary judgment; Exhibits M&N.

DATE	NR.	PROCEEDINGS
Oct. 15	47	SUPPLEMENTAL OPPOSITION by plaintiffs to defendants' motion for summary judgment; Exhibits 4, 5, 6, and 7.
Nov. 15		MOTION of defendant for summary judgment heard, argued and taken under advisement with counsel to be notified. SMITH, J.
Nov. 19	53	ORDER granting WMATA's motion for summary judgment with no defendants remaining; action is dismissed. (N) SMITH, J.
Dec. 01	54	NOTICE OF APPEAL from Order entered Nov. 19, 1982.
Dec. 02		COPY OF NOTICE and docket entries transmitted to U.S.C.A. U.S.C.A. No. 82-2459.*

* For relevant docket entries in the United States Court of Appeals for the District of Columbia Circuit in *Buchanan v. Bechtel Associates Professional Corp.*, D.C., et al., U.S.C.A. No. 82-2459, see docket entries in *Johnson v. Bechtel Associates Professional Corp.*, D.C., et al., U.S.C.A. No. 82-2017 and consolidated cases reprinted at pp. 3-6 of the Joint Appendix.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

C.A. No. 81-1481

CLANAGAN

v.

BECHTEL ASSOCIATES PROFESSIONAL CORPORATION,
D.C., *et al.*

DATE	NR.	PROCEEDINGS
1981		
June 26	1	COMPLAINT; appearance; jury demand.
Aug. 04	2	ANSWER of defendants to complaint; jury demand.
1982		
June 11	79	MOTION by plaintiff for leave to file a second amended complaint deleting all Third Party defendants, adding WMATA an additional party defendant and amending allegations of Count II.
July 12	87	ORDER filed 7-8-82 granting plaintiff's motion for leave to amend complaint; directing that plaintiff's amended complaint is deemed filed nunc pro tunc as of July, 1982. (N) RICHEY, J.
July 12	87A	AMENDED COMPLAINT (second) by plaintiff; jury demand.
Aug. 02	91	ORDER filed 7/29/82 directing defendant WMATA to file a motion for summary judgment on grounds of immunity by virtue of the Workers' Compensation Statute by no later than 8/6/82; directing plaintiff to respond in ten (10) days thereafter to said motion; setting on argument merits on motion for 8/16/82 at 9:30 A.M. RICHEY, J.

DATE	NR.	PROCEEDINGS
Aug. 02	93	ANSWER by defendant WMATA to second amended complaint.
Aug. 12	96	MOTION by WMATA for summary judgment; Exhibits A-D.
Aug. 13	97	SUPPLEMENTAL OPPOSITION by plaintiff to defendant's motion for summary judgment on the issue of statutory immunity.
Aug. 16		ORAL MOTION of defendant WMATA for summary judgment on grounds of immunity by virtue of Worker's Compensation Statute heard and taken under advisement. RICHEY, J.
Aug. 20	104	REPLY of defendant WMATA to plaintiff's opposition to defendants' motion for summary judgment; Exhibits.
Sept. 03	109	MEMORANDUM OPINION filed 9-2-82. (N) RICHEY, J.
Sept. 03	110	ORDER filed 9-2-82 granting defendant's motion for summary judgment; dismissing action without prejudice to the bringing of an entirely new action by plaintiff against the subcontractor for whom he worked. (N) RICHEY, J.
Sept. 09	111	NOTICE of appeal by plaintiff from order of 9-2-82. COPIES of notice of appeal and docket entries transmitted to U.S.C.A. U.S.C.A. No. 82-2063.
Oct. 27	119	MOTION of plaintiff for relief under Rule 60 (b) (3) from the judgment of this court in favor of defendant WMATA; Exhibits 1-9.
Nov. 9	121	OPPOSITION by defendant WMATA to the plaintiff's Rule 60(b) (3) motion for relief; Exhibits A-D.

DATE	NR.	PROCEEDINGS
Nov. 16	122	REPLY by plaintiff to defendant's opposition to the plaintiff's Rule 60(b) (3) motion for relief; Exhibits 10-17.
Nov. 24	123	SUPPLEMENTAL EXHIBITS of WMATA in support of its opposition to the plaintiff's Rule 60(b) (3) motion for relief; Attachment.
Dec. 09	127	COPY of ORDER denying plaintiff's motion for relief pursuant to Rule 60(b) (3); directing plaintiff to pay reasonable costs, including attorneys' fees incurred by the defendant in opposing these motions. (N) (Signed 12/3/82). RICHEY, J.
Dec. 17	129	NOTICE OF APPEAL by plaintiff from decision and order of 12-9-82.
Dec. 28		COPIES of notice of appeal and docket entries transmitted to U.S.C.A. U.S.C.A. No. 82-2530.*

* For relevant docket entries in the United States Court of Appeals for the District of Columbia Circuit in *Clanagan v. Bechtel Associates Professional Corp., D.C., et al.*, U.S.C.A. Nos. 82-2525 and 82-2530, see relevant docket entries in *Johnson v. Bechtel Associates Professional Corp., D.C., et al.*, U.S.C.A. No. 82-2017 and consolidated cases reprinted at pp. 3-6 of the Joint Appendix.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

C.A. No. 81-1261

EIGHMEY

v.

BECHTEL ASSOCIATES PROFESSIONAL CORPORATION,
D.C., *et al.*

DATE	NR.	PROCEEDINGS
1981		
June 02	1	COMPLAINT; jury demand.
Oct. 19	2	ANSWER of defendants to the complaint; jury demand.
May 27	32	MOTION by plaintiffs for leave to file an amended complaint adding an additional party defendant.
June 23	35	ORDER filed 6-21-82 granting motion of defendants Bechtel Associates Professional Corp., D.C. and Bechtel Civil and Minerals, Inc. for summary judgment; denying motion of plaintiffs for partial summary judgment; that plaintiffs' motion for leave to file an amended complaint to make WMATA a defendant is granted solely for purpose of establishing at a hearing to be held on 8-18-82 at 10:00 A.M. whether or not Workmen's Compensation laws bars recovery against WMATA; entering Judgment for defendants Bechtel Associates Professional Corp., D.C., Bechtel Civil and Minerals, Inc. and Third Party defendants McLean-Grove-Skanska Joint Venture and Slattery Associates and dismissing them from this action pursuant to Rule 56 and 54(b) of FRCP. (N) JUNE L. GREEN, J.

DATE	NR.	PROCEEDINGS
June 23	36	AMENDED COMPLAINT.
July 14	40	ANSWER of defendant WMATA to amended complaint; jury demand.
July 15		MOTION of defendant WMATA to dismiss heard in part and continued until 7-20-82 at 10:00 A.M. JUNE GREEN, J.
July 26		MOTION of defendant for summary judgment heard and granted. (OTBP) JUNE GREEN, J.
Aug. 9	43	MEMORANDUM OPINION filed 7-30-82. JUNE GREEN, J.
Aug. 5	45	MOTION by plaintiffs for reconsideration.
Aug. 31	49	OPPOSITION by defendant WMATA to motion for reconsideration; Exhibits A-C.
1982		
Sept. 14	52	SUPPLEMENTAL EXHIBIT by WMATA in support of opposition to motion for reconsideration.
Sept. 15	53	ORDER filed 9-13-82 denying motion of plaintiff for reconsideration. n/r (signed 9-10-82) (N) GREEN, J.
Sept. 23	55	NOTICE of appeal by plaintiffs from order of 9-13-82.
Sept. 23		COPIES of notice of appeal and docket entries transmitted to U.S.C.A. U.S.C.A. No. 82-2148.
Oct. 27	62	MOTION of plaintiffs for relief under Rule 60(b) (3) from the judgment of this Court in favor of defendant WMATA; Exhibits 1-9.
Nov. 09	65	OPPOSITION by defendant WMATA to the plaintiffs' Rule 60(b) (3) motion for relief; Exhibits A-D.

DATE	NR.	PROCEEDINGS
Nov. 16	66	REPLY by plaintiffs to defendant's opposition to the plaintiffs' Rule 60(b) (3) motion for relief; Exhibits 10-17.
Nov. 24	67	SUPPLEMENTAL EXHIBIT of WMATA in support of WMATA's opposition to the plaintiffs' Rule 60(b) (3) motion for relief; Attachment.
Nov. 30	69	COPY OF ORDER from USCA dated 11-9-82 that case 82-2017 and consolidated cases are held in abeyance and further briefing deferred pending ruling of the USDC on appellants' motion for relief under Rule 60(b) (3).
Dec. 01	70	RESPONSE of defendant WMATA to plaintiffs' reply in support of their Rule 60(b) (3) motion for relief; attachments.
Dec. 10	71	ORDER denying motion of plaintiffs for relief under Rule 60(b) (3) of the F.R.C.P. (N) JUNE GREEN, J.
Dec. 17	72	NOTICE of appeal by plaintiffs for decision and order entered 12/10/82.
Dec. 27		COPIES of notice of appeal and docket entries transmitted to U.S.C.A. U.S.C.A. No. 82-2531.*

* For relevant docket entries in the United States Court of Appeals for the District of Columbia Circuit in *Eighmey v. Bechtel Associates Professional Corp., D.C., et al.*, U.S.C.A. No. 82-2531, see relevant docket entries in *Johnson v. Bechtel Associates Professional Corp., D.C., et al.*, U.S.C.A. No. 82-2017 reprinted at pp. 3-6 of the Joint Appendix.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

C.A. No. 81-1125

WALKER

v.

BECHTEL ASSOCIATES PROFESSIONAL CORPORATION,
D.C., *et al.*

DATE	NR.	PROCEEDINGS
1981		
May 14	1	COMPLAINT; appearance; jury demand.
1982		
May 19	196	MOTION of plaintiffs for leave to file an amended complaint adding an additional party defendant and amending allegations of Count II.
June 1	2	ANSWER of defendants to the complaint; jury demand.
July 08	203	ORDER granting plaintiffs' motion for leave to amend complaint; directing that plaintiffs' amended complaint is deemed filed, nunc pro tunc as of July, 1982. (N) RICHEY, J.
July 08	204	AMENDED COMPLAINT of plaintiffs for negligence; jury demand.
July 21		STATUS CALL: Court to issue show cause order directing WMATA to file summary judgment motion by 8-6-82; plaintiffs have 10 days to respond; further status call set for 7-11-82 and 8-16-82 at 9:30 a.m. RICHEY, J.
July 29	208	ORDER directing defendant WMATA to file a motion for summary judgment on grounds of immunity by virtue of the Workers' Compensation Statute by no later than 8-6-82;

DATE	NR.	PROCEEDINGS
		directing plaintiffs to respond to ten (10) days thereafter to said motion; setting hearing on merits on motion for 8-16-82 at 9:30 a.m. (N) RICHEY, J.
Aug. 02	211	ANSWER of defendant WMATA to amended complaint.
Aug. 13	213	SUPPLEMENTAL OPPOSITION of plaintiffs to defendants' motion for summary judgment on the issue of statutory immunity.
Aug. 13	214	MOTION of defendant WMATA for summary judgment; Exhibits A-D.
Aug. 16		ORAL MOTION of defendant WMATA for summary judgment on grounds of immunity by virtue of Workers' Compensation Statute heard and taken under advisement; parties to file responses on outstanding motions by 8-20-82 by 3:30 p.m. simultaneously. RICHEY, J.
Aug. 20	219	REPLY of WMATA in support of its motion for summary judgment; Exhibit D.
Sept. 02	228	ORDER granting defendant's motion for summary judgment; dismissing action without prejudice to the bringing of an entirely new action by plaintiffs against the subcontractor for whom he worked. (N) RICHEY, J.
Sept. 09	229	NOTICE of appeal by plaintiffs from Order entered 9-2-82.
Sept. 10		COPY of notice of appeal and docket entries transmitted to USCA. USCA No. 82-2062.
Oct. 27	235	MOTION of plaintiffs for relief under Rule 60(b) (3) from the judgment of this Court in favor of defendant WMATA; Exhibits 1-13.
Nov. 09	237	OPPOSITION of defendant WMATA to the plaintiffs' Rule 60(b) (3) motion for relief; Exhibits A, B, and C.

DATE	NR.	PROCEEDINGS
Nov. 16	238	REPLY of plaintiffs to defendant's opposition to the plaintiffs' Rule 60(b) (3) motion for relief; Exhibits 14-21.
Nov. 24	239	SUPPLEMENTAL EXHIBIT of defendant WMATA in support of WMATA's opposition to the plaintiffs' Rule 60(b) (3) motion for relief; Attachment.
Nov. 29	240	COPY OF ORDER from USCA filed 11-9-82 that case 82-2017 and consolidated cases are held in abeyance and further briefing deferred pending ruling of the USDC an appellants' motion for relief under Rule 60(b) (3).
Dec. 01	242	RESPONSE of defendant WMATA to plaintiffs' reply in support of their Rule 60(b) (3) motion for relief; Attachments (7). (filed in expandable folder).
Dec. 09	243	ORDER denying plaintiffs' motion for relief pursuant to Rule 60(b) (3); directing plaintiffs to pay reasonable costs including attorneys' fees, incurred by the defendant in opposing these motions. (signed 12-3-82) (N) RICHEY, J.
Dec. 17	245	NOTICE OF APPEAL of plaintiffs from order entered 12-9-82.
Dec. 28		COPIES of notice of appeal and docket entries transmitted to U.S.C.A. U.S.C.A. No. 82-2529.*

* For relevant docket entries in the United States Court of Appeals for the District of Columbia Circuit in *Walker v. Bechtel Associates Professional Corp., D.C., et al.*, U.S.C.A. Nos. 82-2062 and 82-2529, see relevant docket entries in *Johnson v. Bechtel Associates Professional Corp., D.C., et al.*, U.S.C.A. No. 82-2017 reprinted at pp. 3-6 of the Joint Appendix.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

C.A. No. 82-0999

WILLIAMS

v.

WASHINGTON METROPOLITAN AREA
TRANSIT AUTHORITY

DATE	PROCEEDINGS
1982	
Apr. 09	1 COMPLAINT; appearance; jury demand.
Apr. 29	3 ANSWER by defendant Washington Metropolitan Transit Authority to complaint.
Aug. 05	10 MOTION of WMATA for summary judgment; Exhibits A, B, and C.
Aug. 16	11 ORDER directing that plaintiff shall file a response to motion of defendant for summary judgment; defendant shall file a reply to the plaintiff's response no later than 8/23/82, and setting oral argument on motion of defendant for summary judgment on 8/31/82 at 9:00 a.m. (N) FLANNERY, J.
Aug. 17	12 OPPOSITION of plaintiff to the defendant's motion for summary judgment; P&A's; Exhibits.
Aug. 23	13 REPLY of WMATA in support of its motion for summary judgment; Exhibits
Aug. 31	MOTION of defendant for summary judgment, argued and taken under advisement. (Rep: S. Popejoy) FLANNERY, J.
Oct. 07	25 MEMORANDUM filed 10-6-82. (N) FLANNERY, J.

DATE	PROCEEDINGS
Oct. 07	26 JUDGMENT filed 10-6-82 granting motion of defendant WMATA for summary judgment. (N) FLANNERY, J.
Oct. 07	27 MOTION of plaintiff for reconsideration of the court's Order dated 10-6-82 granting defendant's motion for summary judgment; P&A's.
Oct. 14	28 OPPOSITION of defendant to the plaintiff's motion for reconsideration; Exhibits.
Dec. 16	35 ORDER denying motion of plaintiff from Order entered 12/16/82.
Dec. 21	COPY of notice of appeal and docket entries transmitted to U.S.C.A. U.S.C.A. No. 83-1003.*

* For relevant docket entries in the United States Court of Appeals for the District of Columbia Circuit in *Williams v. Washington Metropolitan Area Transit Authority*, U.S.C.A. No. 83-1003, see relevant docket entries in *Johnson v. Bechtel Associates Professional Corp., D.C., et al.*, U.S.C.A. No. 82-2017 reprinted at pp. 3-6 of the Joint Appendix.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

C.A. No. 81-0114

WILMES

v.

BECHTEL CIVIL AND MINERALS, INC., *et al.*

DATE	NR.	PROCEEDINGS
1981		
Jan.	1	COMPLAINT; jury demand; appearance.
Jan. 29	2	ANSWER of Bechtel Civil and Minerals, Inc. and Bechtel Associates Professional Corp., D.C. to the complaint.
1982		
May 19	57	MOTION of plaintiff Stanley Wilmes for leave to file a second amended complaint adding an additional party defendant and amending allegations of Count II.
July 13	63	ORDER granting motion of plaintiff for leave to file a second amended complaint, nunc pro tunc as of May, 1982. (N) FLANNERY, J.
July 16	64	SECOND AMENDED COMPLAINT adding WMATA as defendant.
Aug. 02	69	ANSWER of the defendant WMATA to second amended complaint.
Aug. 20	72	MOTION by defendant WMATA for summary judgment; Exhibits A-D.
Sept. 13	73	NOTICE by plaintiff to take deposition of Robert Thompson, Delmer Ison, James P. Layden and David Sewall.

DATE	NR.	PROCEEDINGS
Sept. 17	80	OPPOSITION by plaintiff to defendant WMATA's motion for summary judgment; Exhibit A.
Sept. 17	81	MOTION by plaintiff for leave of the court to file an amended complaint adding new party defendants.
Sept. 24	82	OPPOSITION by defendant to plaintiff's motion for leave to file an amended complaint.
Oct. 08	90	REPLY by defendant WMATA in support of its motion for summary judgment; Exhibits E-K.
Nov. 09		DEPOSITION by plaintiff of Robert R. Thompson taken on 11-3-82 (unexecuted); Exhibits 1 and 2.
Nov. 17		DEPOSITION of Delmer Ison taken on 11-3-82 on behalf of plaintiff; errata sheets; Exhibits.
Nov. 19	100	MEMORANDUM OF POINTS AND AUTHORITIES by plaintiff in support of the motion to amend the complaint, Exhibits 1-9.
Nov. 19	101	SUPPLEMENTAL OPPOSITION by defendant to plaintiff's motion for leave to file an amended complaint; Exhibit A.
Dec. 01	104	REPLY of defendant WMATA to plaintiff's second supplemental opposition to WMATA's motion for summary judgment; Attachments.
Dec. 09		DEPOSITION of David L. Sewall taken November 3, 1982 by plaintiff; signature waived.
Dec. 10		MOTION of defendant WMATA for summary judgment argued and granted; plaintiff's motion to amend complaint argued and denied. FLANNERY, J.
Dec. 20	106	MEMORANDUM filed 12-16-82. (N) FLANNERY, J.

DATE	NR.	PROCEEDINGS
Dec. 20	107	ORDER filed 12-16-82 granting motion of defendant for summary judgment; denying motion of plaintiff to amend his complaint; and dismissing plaintiff's action. (N) FLANNERY, J.
Dec. 20	108	NOTICE OF APPEAL by plaintiff from order of 12-16-82. COPIES of Notice of Appeal & docket entries transmitted to USCA. USCA No. 82-2525.*

* For relevant docket entries in the United States Court of Appeals for the District of Columbia Circuit in *Wilmes v. Bechtel Civil and Minerals, Inc., et al.*, U.S.C.A. No. 82-2525, see relevant docket entries in *Johnson v. Bechtel Associates Professional Corp., D.C., et al.*, U.S.C.A. No. 82-2017 reprinted at pp. 3-6 of the Joint Appendix.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 81-0963

Judge Corcoran

PAUL JOHNSON,

Plaintiff,

v.

BECHTEL ASSOCIATES PROFESSIONAL CORPORATION,
D.C., *et al.*,

Defendants.

AFFIDAVIT OF DAVID L. SEWALL

[Attached as Exhibit A to WMATA's Motion for
Summary Judgment filed on June 21, 1982]

STATE OF VIRGINIA)
) ss:
COUNTY OF FAIRFAX)

I, DAVID L. SEWALL, being first duly sworn, depose and say that:

1) I am the Branch Claims Manager for the National Loss Control Service Corporation ("NATLSCO").

2) My duties as Branch Claims Manager provide me with personal knowledge of Mr. Paul Johnson's claim for worker's compensation based on injuries he allegedly sustained on or about April 22, 1978 while employed by Ball, Healy, Granite.

3) Mr. Johnson claimed to have suffered occupational loss of hearing and occupational pulmonary disease. At-

tached herewith as Attachment A is an April 22, 1978 medical report by Dr. David B. Simon concerning Mr. Johnson's alleged chronic bronchitis.

4) Liability of Ball, Healy, Granite for workers' compensation was insured by Lumbermen's Mutual Casualty Company pursuant to a compensation insurance program purchase by WMATA. The claim was administered by NATLSCO.

5) Mr. Johnson underwent nonsurgical medical treatment for his alleged injuries. All medical attention received by Mr. Johnson was paid for by the Lumbermen's Mutual Casualty Company. Mr. Johnson's compensation claim was settled for a lump sum payment of \$9,000. A copy of the Department of Labor compensation order approving the aforesaid settlement is attached hereto as Attachment B.

6) The statements made herein are true and correct to the best of my knowledge and belief.

/s/ David L. Sewall
DAVID L. SEWALL

Subscribed and sworn to before me, a Notary Public, this 17th day of June, 1982 in the State of Virginia, City of Fairfax.

/s/ Lora D. Graves
Notary Public

My Commission Expires: October 14, 1985.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 81-0963

Judge Corcoran

PAUL JOHNSON,

Plaintiff,

v.

BECHTEL ASSOCIATES PROFESSIONAL CORPORATION,
D.C., *et al.*,

Defendants.

AFFIDAVIT OF DELMER ISON

[Attached as Exhibit B to WMATA's Motion for
Summary Judgment filed on June 21, 1982]

DISTRICT OF)
) ss:
COLUMBIA)

I, DELMER ISON, being first duly sworn, depose and say that:

1) I am the Secretary of the Washington Metropolitan Area Transit Authority ("WMATA") and its Acting Director of Claims.

2) My duties as Secretary and Acting Director of Claims provide me with personal knowledge of the workers' compensation program that applies to construction workers on the WMATA subway system.

3) WMATA, as the general contractor, has contracted with private construction companies, as private sub-contractors, to build the WMATA subway system.

4) The subcontractors do not provide workers' compensation insurance for their employees. Instead, WMATA, as general contractor, provides workers' compensation insurance for the employees of its subcontractors.

5) The plaintiff, Paul Johnson, was an employee of one of WMATA's private subcontractors, Ball, Healy, Granite, during the time of his alleged injury.

6) As an employee of a WMATA subcontractor, Mr. Johnson was covered by WMATA's workers' compensation insurance program for any alleged injury that occurred within the scope of his employment.

7) The compensation insurance carrier retained by WMATA is Lumbermen's Mutual Casualty Company and the compensation program was administered by the National Loss Control Service Corporation.

8) The statements made herein are true and correct to the best of my knowledge and belief.

/s/ Delmer Ison
DELMER ISON

Subscribed and sworn to before me, a Notary Public, this 17th day of June, 1982 in the District of Columbia.

/s/ Rose M. Remund
Notary Public

My Commission Expires: Feb. 28, 1985

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 82-0999

GLENWOOD WILLIAMS,
Plaintiff,

v.

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY,
Defendant.

AFFIDAVIT OF DELMER ISON

[Attached as Exhibit A to WMATA's Motion for
Summary Judgment filed on August 5, 1982]

DISTRICT OF)
) ss:
COLUMBIA)

I, DELMER ISON, being first duly sworn, depose and say that:

1) I am the Secretary of the Washington Metropolitan Area Transit Authority ("WMATA") and its Acting Director of Claims.

2) My duties as Secretary and Acting Director of Claims provide me with personal knowledge of the workers' compensation program that applies to construction workers on the WMATA subway system.

3) WMATA, as the general contractor, has contracted with private construction companies, as subcontractors, to build the WMATA subway system.

4) The subcontractors do not provide workers' compensation insurance for their employees. Instead, WMATA,

as general contractor, provides workers' compensation insurance for the employees of its subcontractors.

5) The plaintiff, Glenwood Williams, was an employee of WMATA's subcontractors during the time of his alleged injuries.

6) As an employee of WMATA subcontractors, Mr. Williams was covered by WMATA's workers' compensation insurance program for any alleged injury that occurred within the scope of his employment.

7) The compensation insurance carrier retained by WMATA is Lumbermen's Mutual Casualty Company and the compensation program was administered by the National Loss Control Service Corporation.

8) The plaintiff has applied for and received compensation benefits for lung injuries allegedly resulting from his purported exposure to injurious substances while he was working on the WMATA subway system.

9) The statements made herein are true and correct to the best of my knowledge and belief.

/s/ Delmer Ison
DELMER ISON

Subscribed and sworn to before me, a Notary Public, this 8th day of August, 1982 in the District of Columbia.

/s/ [Illegible]
Notary Public

My Commission Expires: Jan. 14, 1985

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 82-0999

GLENWOOD WILLIAMS,

Plaintiff,

v.

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY,
Defendant.

AFFIDAVIT OF DAVID L. SEWALL

[Attached as Exhibit B to WMATA's Motion for
Summary Judgment filed on August 5, 1982]

STATE OF VIRGINIA)
) ss:
COUNTY OF FAIRFAX)

I, DAVID L. SEWALL, being first duly sworn, depose
and say that:

1) I am the Branch Claims Manager for the National
Loss Control Service Corporation ("NATLSCO").

2) My duties as Branch Claims Manager provide me
with personal knowledge of Mr. Glenwood Williams'
claim for worker's compensation based on injuries he
allegedly sustained while employed by subcontractors
working on the Washington Metropolitan Area Transit
Authority ("WMATA") subway system.

3) Mr. Williams claimed to have suffered lung in-
juries because of his alleged exposure to injurious sub-
stances while working on the construction of the WMATA
subway system. Mr. Williams filed a claim for work-

men's compensation benefits on or about December 15, 1978.

4) WMATA purchased workmen's compensation insurance that applied to the plaintiff. The plaintiff worked for subcontractors who did not purchase such compensation insurance. The insurance was purchased from Lumbermen's Mutual Casualty Company and it was administered by NATLSCO.

5) Mr. Williams' compensation claim was settled for Ninety-Eight Thousand Dollars (\$98,000.00) plus future medicals. On August 28, 1981, the Department of Labor issued a final compensation order approving the aforesaid settlement of the plaintiff's compensation claim. A copy of the Department of Labor compensation order is attached hereto as Attachment A.

6) The statements made herein are true and correct to the best of my knowledge and belief.

/s/ David L. Sewall
DAVID L. SEWALL

Subscribed and sworn to before me, a Notary Public, this 5th day of August, 1982 in the State of Virginia, City of Fairfax.

/s/ [Illegible]
Notary Public

My Commission Expires: Sept. 8, 1985

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 81-1481

JOHN WARREN CLANAGAN,
Plaintiff,

v.

BECHTEL ASSOCIATES PROFESSIONAL CORPORATION,
D.C., *et al.,*
Defendants.

AFFIDAVIT OF DELMER ISON

[Attached as Exhibit D to WMATA's Motion for
Summary Judgment filed on August 12, 1982]

DISTRICT OF)
) ss:
COLUMBIA)

I, DELMER ISON, being first duly sworn, depose and
say that:

1) I am the Secretary of the Washington Metropolitan
Area Transit Authority ("WMATA") and its Acting
Director of Claims.

2) My duties as Secretary and Acting Director of
Claims provide me with personal knowledge of the work-
ers' compensation program that applies to construction
workers on the WMATA subway system.

3) WMATA, as the general contractor, has contracted
with private construction companies, as subcontractors,
to build the WMATA subway system.

4) The subcontractors do not provide workers' compensation insurance for their employees. Instead, WMATA, as general contractor, provides workers' compensation insurance for the employees of its subcontractors.

5) The plaintiff, John Warren Clanagan, was an employee of WMATA's subcontractors during the time of his alleged injuries.

6) As an employee of WMATA subcontractors, Mr. Clanagan was covered by WMATA's workers' compensation insurance program for any alleged injury that occurred within the scope of his employment.

7) The compensation insurance carrier retained by WMATA is Lumbermen's Mutual Casualty Company and the compensation program was administered by the National Loss Control Service Corporation.

8) The plaintiff has applied for and will receive compensation benefits for lung injuries allegedly resulting from his purported exposure to injurious substances while he was working on the WMATA subway system.

9) The statements made herein are true and correct to the best of my knowledge and belief.

/s/ Delmer Ison
DELMER ISON

Subscribed and sworn to before me, a Notary Public, this 12th day of August, 1982 in the District of Columbia.

/s/ Lora D. Graves
Notary Public, D.C.

My Commission Expires: Jan. 14, 1985

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 81-1481

JOHN WARREN CLANAGAN,
Plaintiff,
v.

BECHTEL ASSOCIATES PROFESSIONAL CORPORATION,
D.C., *et al.,*
Defendants.

AFFIDAVIT OF DAVID L. SEWALL

[Attached as Exhibit C to WMATA's Motion for
Summary Judgment filed on August 12, 1982]

STATE OF VIRGINIA)
) ss:
COUNTY OF FAIRFAX)

I, DAVID L. SEWALL, being first duly sworn, depose
and say that:

1) I am the Branch Claims Manager for the National
Loss Control Service Corporation ("NATLSCO").

2) My duties as Branch Claims Manager provide me
with personal knowledge of Mr. John Warren Clanagan's
claim for worker's compensation based on injuries he
allegedly sustained while employed by subcontractors
working on the Washington Metropolitan Area Transit
Authority ("WMATA") subway system.

3) Mr. Clanagan claimed to have suffered lung injuries
because of his alleged exposure to injurious substances
while working on the construction of the WMATA sub-

way system. Mr. Clanagan filed a claim for workmen's compensation benefits on or about June 9, 1978.

4) WMATA purchased workmen's compensation insurance that applied to the plaintiff. The plaintiff worked for subcontractors who did not purchase such compensation insurance. The insurance was purchased from Lumbermen's Mutual Casualty Company and it was administered by NATLSCO.

5) Mr. Clanagan's compensation claim has been settled for Fifty-Five Thousand Four Hundred and Fifty Five Dollars (\$55,455.00). A copy of the joint petition to the Department of Labor seeking approval of the settlement is attached hereto as Attachment A.

6) The statements made herein are true and correct to the best of my knowledge and belief.

/s/ David L. Sewall
DAVID L. SEWALL

Subscribed and sworn to before me, a Notary Public, this 12th day of August, 1982 in the State of Virginia, City of Fairfax.

/s/ [Illegible]
Notary Public

My Commission Expires: October 14, 1985.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 81-1125

CALVIN WALKER, *et ux.*,
Plaintiffs,
v.

BECHTEL ASSOCIATES PROFESSIONAL CORPORATION,
D.C., *et al.*,
Defendants.

AFFIDAVIT OF DELMER ISON

[Attached as Exhibit D to WMATA's Motion for
Summary Judgment filed on August 13, 1982]

DISTRICT OF)
) ss:
COLUMBIA)

I, DELMER ISON, being first duly sworn, depose and
say that:

(1) I am the Secretary of the Washington Metropolitan
Area Transit Authority ("WMATA") and its Acting
Director of Claims.

(2) My duties as Secretary and Acting Director of
Claims provide me with personal knowledge of the work-
ers' compensation program that applies to construction
workers on the WMATA subway system.

(3) WMATA, as the general contractor, has contracted
with private construction companies, as subcontractors,
to build the WMATA subway system.

(4) The subcontractors do not provide workers' compensation insurance for their employees. Instead, WMATA, as general contractor, provides workers' compensation insurance for the employees of its subcontractors.

(5) The male plaintiff, Calvin Walker, was an employee of WMATA's subcontractors during the time of his alleged injuries.

(6) As an employee of WMATA subcontractors, Mr. Walker was covered by WMATA's workers' compensation insurance program for any alleged injury that occurred within the scope of his employment.

(7) The compensation insurance carrier retained by WMATA is Lumbermen's Mutual Casualty Company and the compensation program was administered by the National Loss Control Service Corporation.

(8) Mr. Walker has applied for and will receive compensation benefits for lung injuries allegedly resulting from his purported exposure to injurious substances while he was working on the WMATA subway system.

(9) The statements made herein are true and correct to the best of my knowledge and belief.

/s/ Delmer Ison
DELMER ISON

Subscribed and sworn to before me, a Notary Public, this 13th day of August, 1982 in the District of Columbia.

/s/ Rose M. Remund
Notary Public

My Commission Expires: Feb. 28, 1985

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 81-1125

CALVIN WALKER, *et ux.*,
Plaintiffs,
v.

BECHTEL ASSOCIATES PROFESSIONAL CORPORATION,
D.C., *et al.*,
Defendants.

AFFIDAVIT OF DAVID L. SEWALL

[Attached as Exhibit C to WMATA's Motion for
Summary Judgment filed on August 13, 1982]

DISTRICT OF)
) ss:
COLUMBIA)

I, DAVID L. SEWALL, being first duly sworn, depose
and say that:

(1) I am the Branch Claims Manager for the National
Loss Control Service Corporation ("NATLSCO").

(2) My duties as Branch Claims Manager provide me
with personal knowledge of Mr. Calvin Walker's claim
for workers' compensation based on injuries he allegedly
sustained while employed by subcontractors working on
the Washington Metropolitan Area Transit Authority
("WMATA") subway system.

(3) Mr. Walker claimed to have suffered lung injuries
because of his alleged exposure to injurious substances
while working on the construction of the WMATA sub-

way system. Mr. Walker filed a claim for workmen's compensation benefits in or about August, 1980.

(4) WMATA purchased workmen's compensation insurance that applied to Mr. Walker. Mr. Walker worked for subcontractors who did not purchase such compensation insurance. The insurance was purchased from Lumbermen's Mutual Casualty Company and it was administered by NATLSCO.

(5) Mr. Walker's compensation claim has been settled for One Hundred and Twenty Thousand Dollars (\$120,000.00). A copy of the joint petition to the Department of Labor seeking such approval is attached hereto as Attachment A.

(6) The aforementioned joint petition indicates that since August 1980, Mr. Walker has been continuously represented by his present counsel, Ashcraft & Gerel, concerning his alleged lung injuries.

(7) The statements made herein are true and correct to the best of my knowledge and belief.

/s/ David L. Sewall
DAVID L. SEWALL

Subscribed and sworn to before me, a Notary Public, this 13th day of August, 1982 in the District of Columbia.

/s/ Lora D. Graves
Notary Public

My Commission Expires: Jan. 14, 1985

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 81-0114

STANLEY WILMES,

Plaintiff,

v.

BECHTEL CIVIL AND MINERALS, INC., *et al.*,
Defendants.

AFFIDAVIT OF DELMER ISON

[Attached as Exhibit D to WMATA's Motion for
Summary Judgment filed on August 20, 1982]

DISTRICT OF)
) ss:
COLUMBIA)

I, DELMER ISON, being first duly sworn, depose and say that:

1) I am the Secretary of the Washington Metropolitan Area Transit Authority ("WMATA") and its Acting Director of Claims.

2) My duties as Secretary and Acting Director of Claims provide me with personal knowledge of the workers' compensation program that applies to construction workers on the WMATA subway system.

3) WMATA, as the general contractor, has contracted with private construction companies, as subcontractors, to build the WMATA subway system.

4) The subcontractors do not provide workers' compensation insurance for their employees. Instead, WMATA, as general contractor, provides workers' compensation insurance for the employees of its subcontractors.

5) The plaintiff, Stanley Wilmes, was an employee of WMATA's subcontractors during the time he claims he sustained work-related lung injuries.

6) As an employee of WMATA subcontractors, Mr. Wilmes was covered by WMATA's workers' compensation insurance program for any alleged injury that occurred within the scope of his employment.

7) The compensation insurance carrier retained by WMATA is Lumbermen's Mutual Casualty Company and the compensation program was administered by the National Loss Control Service Corporation.

8) The plaintiff has applied for compensation benefits for lung injuries, including silicosis, which he claims were caused by his alleged exposure to injurious substances while he was working on the WMATA subway system.

9) If the plaintiff prevails on his compensation claim, the compensation benefits will be provided from the compensation insurance purchased by WMATA.

10) The statements made herein are true and correct to the best of my knowledge and belief.

/s/ Delmer Ison
DELMER ISON

Subscribed and sworn to before me, a Notary Public, this 19th day of August, 1982 in the District of Columbia.

/s/ Rose M. Remund
Notary Public

My Commission Expires: Feb. 28, 1985

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 81-0114

STANLEY WILMES,

Plaintiff,

v.

BECHTEL CIVIL AND MINERALS, INC., *et al.*,
Defendants.

AFFIDAVIT OF DAVID L. SEWALL

[Attached as Exhibit C to WMATA's Motion for
Summary Judgment filed on August 20, 1982]

STATE OF VIRGINIA)
) ss:
COUNTY OF FAIRFAX)

I, DAVID L. SEWALL, being first duly sworn, depose
and say that:

1) I am the Branch Claims Manager for the National
Loss Control Service Corporation ("NATLSCO").

2) My duties as Branch Claims Manager provide me
with personal knowledge of Mr. Stanley Wilmes' claim
for worker's compensation based on injuries he allegedly
sustained while employed by subcontractors working on
the Washington Metropolitan Area Transit Authority
("WMATA") subway system.

3) Mr. Wilmes claimed to have suffered lung injuries,
including silicosis, because of his alleged exposure to

injurious substances while working on the construction of the WMATA subway system. Mr. Wilmes filed a claim for workmen's compensation benefits on or about October 3, 1978.

4) WMATA purchased workmen's compensation insurance that applied to the plaintiff. The plaintiff worked for subcontractors who did not purchase such compensation insurance. The insurance was purchased from Lumbermen's Mutual Casualty Company and it was administered by NATLSCO.

5) If the plaintiff prevails on his compensation claim for lung injuries, the compensation benefits will be provided from the compensation insurance purchased by WMATA.

6) The plaintiff's counsel at the time of his October, 1978, worker's compensation claim, and throughout all proceedings related thereto, has been his present counsel in this litigation, Ashcraft & Gerel. Accordingly, since October, 1978, plaintiff appears to have been continuously represented by Ashcraft & Gerel concerning his alleged lung injuries.

7) The statements made herein are true and correct to the best of my knowledge and belief.

/s/ David L. Sewall
DAVID L. SEWALL

Subscribed and sworn to before me, a Notary Public, this 20th day of August, 1982 in the State of Virginia, City of Fairfax.

/s/ [Illegible]
Notary Public

My Commission Expires: August 31, 1984

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 81-3057

JAMES BUCHANAN, *et ux.*,
Plaintiffs,

v.

BECHTEL CIVIL AND MINERALS, INC., *et al.*,
Defendants.

AFFIDAVIT OF DELMER ISON

[Attached as Exhibit D to WMATA's Motion for
Summary Judgment filed on September 14, 1982]

DISTRICT OF)
) ss:
COLUMBIA)

I, DELMER ISON, being first duly sworn, depose and say that:

1) I am the Secretary of the Washington Metropolitan Area Transit Authority ("WMATA") and its Acting Director of Claims.

2) My duties as Secretary and Acting Director of Claims provide me with personal knowledge of the workers' compensation program that applies to construction workers on the WMATA subway system.

3) WMATA, as the general contractor, has contracted with private construction companies, as subcontractors, to build the WMATA subway system.

4) The subcontractors do not provide workers' compensation insurance for their employees. Instead, WMATA,

as general contractor, provides workers' compensation insurance for the employees of its subcontractors.

5) The male plaintiff, James Buchanan, was an employee of WMATA's subcontractors during the time he claims to have sustained work-related lung injuries.

6) As an employee of WMATA subcontractors, Mr. Buchanan was covered by WMATA's workers' compensation insurance program for any alleged injury that occurred within the scope of his employment.

7) The compensation insurance carrier retained by WMATA is Lumbermen's Mutual Casualty Company and the compensation program was administered by the National Loss Control Service Corporation.

8) Mr. Buchanan has applied for compensation benefits for lung injuries which he claims were caused by his alleged exposure to injurious substances while he was working on the WMATA subway system.

9) If Mr. Buchanan prevails on his compensation claim, the compensation benefits will be provided from the compensation insurance purchased by WMATA.

10) The statements made herein are true and correct to the best of my knowledge and belief.

/s/ Delmer Ison
DELMER ISON

Subscribed and sworn to before me, a Notary Public, this 10th day of September, 1982 in the District of Columbia.

/s/ Lora D. Graves
Notary Public, D.C.

My Commission Expires: Jan. 14, 1985

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 81-3057

JAMES BUCHANAN, *et ux.*,
Plaintiffs,
v.

BECHTEL CIVIL AND MINERALS, INC., *et al.*,
Defendants.

AFFIDAVIT OF DAVID L. SEWALL

[Attached as Exhibit C to WMATA's Motion for
Summary Judgment filed on September 14, 1982]

STATE OF VIRGINIA)
) ss:
COUNTY OF FAIRFAX)

I, DAVID L. SEWALL, being first duly sworn, depose
and say that:

- 1) I am the Branch Claims Manager for the National
Loss Control Service Corporation ("NATLSCO").
- 2) My duties as Branch Claims Manager provide me
with personal knowledge of Mr. Buchanan's claim for
worker's compensation based on injuries he allegedly sus-
tained while employed by subcontractors working on
the Washington Metropolitan Area Transit Authority
("WMATA") subway system.
- 3) Mr. Buchanan claimed to have suffered lung in-
juries because of his alleged exposure to injurious sub-
stances while working on the construction of the WMATA
subway system. Mr. Buchanan filed a claim for work-

men's compensation benefits on or about September 27, 1979.

4) WMATA purchased workmen's compensation insurance that applied to Mr. Buchanan. Mr. Buchanan worked for subcontractors who did not purchase such compensation insurance. The insurance was purchased from Lumbermen's Mutual Casualty Company and it was administered by NATLSCO.

5) If Mr. Buchanan prevails on his compensation claim for lung injuries, the compensation benefits will be provided from the compensation insurance purchased by WMATA.

6) The plaintiffs' counsel at the time of Mr. Buchanan's September 27, 1979, worker's compensation claim, and throughout all proceedings related thereto, have been plaintiffs' present counsel in this litigation, Ashcraft & Gerel. Accordingly, since September, 1979, plaintiffs appear to have been continuously represented by Ashcraft & Gerel concerning Mr. Buchanan's alleged lung injuries.

7) The statements made herein are true and correct to the best of my knowledge and belief.

/s/ David L. Sewall
DAVID L. SEWALL

Subscribed and sworn to before me, a Notary Public, this 10th day of September, 1982 in the State of Virginia, City of Fairfax.

/s/ [Illegible]
Notary Public

My Commission Expires: August 31, 1984

**[DEPARTMENT OF LABOR, OFFICE OF WORKMEN'S
COMPENSATION PROGRAMS: JOINT PETITION
FOR APPROVAL OF SETTLEMENT AGREEMENT]**

[Attached as Exhibit A to WMATA's Motion for
Summary Judgment filed on August 21, 1982 in
*Clanagan v. Bechtel Associates Professional
Corp., D.C., et al., C.A. No. 81-1481*]

ASHCRAFT & GEREL
ATTORNEYS AND COUNSELLORS AT LAW
Suite 700
2000 L Street, N.W.
Washington, D.C. 20036

(202) 783-6400

June 15, 1982

The Honorable Janice V. Bryant
Deputy Commissioner
Office of Workers' Compensation
Programs
1111 - 20th Street, N.W.
Washington, D.C. 20211

Re: John W. Clanagan
Vs: Ball Healy Granite
OWCP No. 126495
D/A: 1/1/78

Dear Commissioner Bryant:

This is a joint petition by the parties in the above-captioned matter for approval of an agreed settlement, pursuant to Section 8(i) (A) of the Longshoremen's and Harbor Workers' Compensation Act and implementation regulation 702.241. In support of said application, the parties rely on the following facts:

1. On January 1, 1978, the claimant, John W. Clanagan, sustained an occupational lung disease while in the course of his employment with Ball Healy Granite.

2. At the time of his injury, the claimant's average weekly wage was \$505.00, providing him with a compensation rate of \$336.67.

3. The claimant has not received medical care for this condition, but he was advised, however, in January 1981, to obtain work other than that which involves work underground.

4. As noted above, the claimant was advised to do different employment than that which he was previously working at in January 1981. The claimant moved to Gainesville, Virginia, a rural area, where he has recently gone into business for himself selling firewood and performing odd jobs.

5. Although the claimant has sustained some permanent medical disability as a result of his condition of January 1, 1978, claimant and his counsel acknowledge that it will be difficult to establish that the claimant has sustained a loss of wage-earning capacity since he voluntarily removed himself from the Washington metropolitan area. Although earning a wage less than that which he was earning at the time of his occupational lung disease, it is further acknowledged that it will be difficult to establish a loss of wage-earning capacity as the area in which the claimant lives is economically depressed, and the wages, as a whole, are significantly lower than that in the District of Columbia. It is also important to note that the claimant intends to use part of the proceeds from this settlement to expand his present business operation to include the removal of trash.

6. Considering all of these circumstances, the employer and insurer have agreed to pay, and the claimant has agreed to accept, a lump sum in the amount of \$55,455.00 in settlement of this case.

7. The parties believe that the said agreed settlement is being made in the claimant's best interest.

8. The parties further agree that the said settlement is being made without prejudice to the claimant's right to continue to receive medical services for any condition which is causally related to his occupational lung disease of January 1, 1978.

9. The claimant has been fully advised of his rights under the Act and is fully aware that the approval of the said agreed settlement by the Deputy Commissioner will discharge the employer and insurer from any further liability in this matter, with the exception of medical services referred to in paragraph 8.

10. The law firm of Ashcraft & Gerel has represented the claimant continuously since June 1978 and has counseled him with regard to his case. In addition, counsel has continually reviewed his file from a legal and medical standpoint, and has engaged in negotiations with the employer and insurer in an effort to arrive at the agreed settlement.

The carrier has agreed to pay, in addition to the settlement figure of \$55,455.00, a fee of \$14,545.00 to the law firm of Ashcraft & Gerel. It is understood that this fee is separate from the settlement money aforementioned, and that \$545.00 will be used to pay for the medical reports of Drs. Steinberg and Mehlman.

Respectfully submitted,

/s/ John W. Clanagan
JOHN W. CLANAGAN
Claimant

/s/ Allen J. Lowe
ALLEN J. LOWE
Attorney for Claimant

/s/ James M. Barnes, Jr.
Employer-Insurer

Date—6-19-82

**[DEPARTMENT OF LABOR, OFFICE OF WORKMEN'S
COMPENSATION PROGRAMS: JOINT PETITION
FOR APPROVAL OF SETTLEMENT AGREEMENT]**

[Attached as Exhibit A to WMATA's Motion for
Summary Judgment filed on August 13, 1982 in
Walker v. Bechtel Associates Professional Corp.,
D.C., et al., C.A. No. 81-1125]

ASHCRAFT & GEREL
ATTORNEYS AND COUNSELLORS AT LAW
Suite 700
2000 L Street, N.W.
Washington, D.C. 20036

The Honorable Janice V. Bryant
Deputy Commissioner
Office of Workmen's Compensation
Programs
1111 20th Street, N.W.
Washington, D.C. 20211

Re: Calvin Walker v.
Fruin and Colnon
D/A: November 9, 1979
OWCP No. 162512
Carrier No. 202 CU 106191Z

Dear Commissioner Bryant:

This is a joint petition by the parties in the above captioned matter for approval of an agreed settlement, pursuant to Section 8(i)(A) of the Longshoremen's and Harbor Workers' Compensation Act and implementation regulation 702.241. In support of said application, the parties rely on the following facts:

1. On November 9, 1979, the claimant, Calvin Walker, was last exposed to underground dust, mists and fumes

in the course of his employment with Fruin and Colnon on the Bethesda Station Metro excavation.

2. At the time of his last injurious exposure, the employer was insured by Lumbermans Mutual Casualty Company.

3. The claimant's average weekly wage on November 9, 1979 was \$429.57 per week.

4. The carrier has controverted this claim on the basis of causally related disability, notice, the statute of limitations and the nature and extent of disability. No benefits have been paid to date.

5. Medical treatment has been provided by the Veterans Administration Hospital. No surgery is indicated and the claimant is not presently under active medical treatment.

6. Dr. David Simon has indicated that Mr. Walker has a moderate pulmonary impairment which disables him from underground construction work. Dr. Simon has indicated that the claimant is capable of performing sedentary work duties.

7. Because of the medical opinion of Dr. Philip Witorsch, claimant acknowledges that the claim for disability benefits in this case may not be awarded as claimed.

8. Under these circumstances, the carrier has agreed to pay and the claimant has agreed to accept lump sum in the amount of \$120,000 in settlement of this case.

9. The parties believe that the said agreed settlement is being made in his best interests.

10. The parties further agree that the said settlement is being made without prejudice to the claimant's right to continue to receive medical services for any conditions which are causally related to his injury of November 9, 1979.

11. The claimant has been fully advised of his rights under the Act and is fully aware that the approval of the said agreed settlement by the Deputy Commissioner will discharge the employer and insurer from any further liability in this matter, with the exception of medical services referred to in paragraph 10.

12. The law firm of Ashcraft & Gerel has represented the claimant continuously since August 7, 1980, and counseled with him with regard to his case. In addition, counsel has continually reviewed his file from a legal and medical standpoint and has engaged in negotiations with the employer and insurer in an effort to arrive at the agreed settlement.

Accordingly, the law firm of Ashcraft and Gerel is requesting approval of an attorney's fee in the amount of \$20,000. The amount of the fee has been discussed with the claimant, and he understands that it is to be deducted from the amount of the settlement and has agreed that the said fee is fair and reasonable.

Respectfully submitted,

/s/ Calvin Walker
CALVIN WALKER
Claimant

/s/ William F. Mulroney
WILLIAM F. MULRONEY
Attorney for Claimant

/s/ James M. Barnes, Jr.
Employer-Insurer

EMPLOYMENT STANDARDS ADMINISTRATION

OFFICE OF WORKERS' COMPENSATION PROGRAMS

Case No. 132015

GLENWOOD WILLIAMS

Claimant

v.

BALL-HEALY-GRANITE

Employer

NATIONAL LOSS CONTROL

Insurance Carrier

COMPENSATION ORDER

[Attached as Exhibit 13 to the Plaintiff's Opposition to the Defendant's Motion for Summary Judgment filed on August 17, 1982 in *Williams v. Washington Metropolitan Area Transit Authority*, C.A. No. 82-0999]

APPROVAL OF AGREED SETTLEMENT—
Section 8(i) (A)

Pursuant to agreement and stipulation by and between the interested parties, and such further investigation in the above entitled claim having been made as is considered necessary, and no hearing having been applied for by any party in interest, or considered necessary by the Deputy Commissioner, the Deputy Commissioner makes the following:

FINDINGS OF FACT

1. On 11-18-76, the claimant herein, while employed by the employer herein, suffered injury to his lung.

2. The liability of the employer for compensation under the Act was insured by National Loss Control.

3. The claim was controverted by the insurance carrier.

4. The parties have agreed on the pertinent issues and desire to settle the claim on the following basis: A lump sum of \$98,000.00 and future medical treatment for any condition that is causally related to the injury of 11-18-76.

5. The Deputy Commissioner, pursuant to the authority vested in her in section 8(i)(A) of the Longshoremen's and Harbor Workers' Compensation Act, as amended, finds that it is in the best interest of the employee, approves the agreed settlement, and effects a final disposition of claim, discharging the liability of the employer and insurance carrier for such compensation, except for medical treatment.

6. An attorney's fee in the amount of \$15,438.00 of which \$438.00 is to be used to pay Drs. Simon and Silver is hereby approved in favor of the firm of Ashcraft & Gerel. This fee is payable out of compensation due the claimant.

ORDER

It is ORDERED that the employer and insurance carrier shall pay forthwith all amounts due in accord with the settlement agreement, and file form LS-208 showing timely payment of the settlement amount.

Given under my hand and filed at Washington, D.C. this 28th day of August, 1981.

/s/ Janice V. Bryant
JANICE V. BRYANT

[Certificate of Service Omitted in Printing]

EMPLOYMENT STANDARDS ADMINISTRATION

OFFICE OF WORKERS' COMPENSATION PROGRAMS

Case Nos. : 125242 and
130053

PAUL JOHNSON

Claimant

v.

BALL, HEALY, GRANITE

Employer

LUMBERMEN'S MUTUAL CASUALTY CO.

Insurance Carrier

COMPENSATION ORDER

[Attached as Exhibit B to WMATA's Motion for
Summary Judgment filed on June 21, 1982 in
*Johnson v. Bechtel Associates Professional
Corp., D.C., et al., C.A. No. 81-0963*]

APPROVAL OF AGREED SETTLEMENT—
Section 8(i) A

Pursuant to agreement and stipulation by and between the interested parties, and such further investigation in the above entitled claim having been made as is considered necessary, and no hearing having been applied for by any party in interest, or considered necessary by the Deputy Commissioner, the Deputy Commissioner makes the following:

FINDINGS OF FACT

1. On April 22, 1978 and May 16, 1978, the claimant herein, while employed by the employer herein, suffered an occupational loss of hearing and an occupational pulmonary disease.

2. The liability of the employer for compensation under the Act was insured by Lumbermen's Mutual Casualty Company.

3. The claimant was provided with medical treatment and was paid compensation for such injuries.

4. The parties have agreed on the pertinent issues and desire to settle the claim on the following basis: An additional lump sum of \$9,000.00 and future medical treatment for any condition that is causally related to the injuries of April 22, 1978 and May 16, 1978.

5. The Deputy Commissioner, pursuant to the authority vested in her in Section 8(i)A of the Longshoremen's and Harbor Workers' Compensation Act, as amended, finds that it is in the best interest of the employee, approves the agreed settlement, and effects a final disposition of claim, discharging the liability of the employer and insurance carrier for such compensation, except for medical treatment.

6. An attorney's fee in the amount of \$2,159.00, of which \$150.00 is to be used to pay Dr. David B. Simon, is hereby approved in favor of the firm of Ashcraft & Gerel. This fee is payable out of compensation due the claimant.

ORDER

It is ORDERED that the employer and insurance carrier shall pay forthwith all amounts due in accord with the settlement agreement, and file form LS-208 showing timely payment of the settlement amount.

Given under my hand and filed at Washington, D.C.
this 13th day of March, 1981.

/s/ Janice V. Bryant
JANICE V. BRYANT
Deputy Commissioner
40th Compensation District

CERTIFICATE OF FILING AND SERVICE

I certify that on March 13, 1981 the foregoing Compensation Order was filed in the Office of the Deputy Commissioner, 40th Compensation District and a copy thereof was mailed on said date by certified mail to the parties and their representatives at the last known address of each as follows:

Paul Johnson
11235 Oakleaf Drive
Silver Spring, MD 20902
Claimant

Langley McKinney
Lumbermen's Mutual Casualty
8316 Arlington Blvd.
Fairfax, VA 22031
Insurance Carrier or Employer
(if self-insured)

A copy was also mailed by regular mail to the following:

Director, Office of Workers' Compensation Programs,
(LHWCA), U.S. Department of Labor,
Washington, D.C. 20211

James F. Green, Esquire
2000 L Street, N.W., #700
Washington, DC 20036

/s/ Janice V. Bryant
JANICE V. BRYANT
Deputy Commissioner
40th Compensation District
U.S. Department of Labor
EMPLOYMENT STANDARDS
ADMINISTRATION
Office of Workers' Compensation
Programs

If any compensation, payable under the terms of an award, is not paid within ten days after it becomes due, there shall be added to such unpaid compensation an amount equal to 20 percent thereof. The additional amount shall be paid at the same time as, but in addition to, such compensation.

The date compensation is due is the date of the Deputy Commissioner filed the decision or order in his office.

EMPLOYMENT STANDARDS ADMINISTRATION
OFFICE OF WORKERS' COMPENSATION PROGRAMS

Case No. 133142

HOWARD L. EIGHMEY

Claimant

v.

MCLEAN-GROVE-SKANSKA

Employer

NATIONAL LOSS CONTROL

Insurance Carrier

COMPENSATION ORDER

[Filed on pp. 128-29 of WMATA's Record Excerpts in
Johnson v. Bechtel Associates Professional Corp.,
D.C., et al., No. 82-2017]

APPROVAL OF AGREED SETTLEMENT—
Section 8(i) (A)

Pursuant to agreement and stipulation by and between the interested parties, and such further investigation in the above entitled claim having been made as is considered necessary, and no hearing having been applied for by any party in interest, or considered necessary by the Deputy Commissioner, the Deputy Commissioner makes the following:

FINDINGS OF FACT

1. On January 19, 1979, the claimant herein, while employed by the employer herein, suffered injury to his back, head, neck and legs.
2. The liability of the employer for compensation under the Act was insured by National Loss Control.

3. The claimant was provided with medical treatment and was paid compensation for temporary total disability benefits to date.

4. The parties have agreed on the pertinent issues and desire to settle the claim on the following basis: An additional lump sum of \$80,000 and future medical treatment for any condition that is causally related to the injury of January 19, 1979.

5. The Deputy Commissioner, pursuant to the authority vested in her in section 8(i)(A) of the Longshoremen's and Harbor Workers' Compensation Act, as amended, finds that it is in the best interest of the employee, approves the agreed settlement, and effects a final disposition of claim, discharging the liability of the employer and insurance carrier for such compensation, except for medical treatment.

ORDER

It is ORDERED that the employer and insurance carrier shall pay forthwith all amounts due in accord with the settlement agreement, and file form LS-208 showing timely payment of the settlement amount.

Given under my hand and filed at Washington, D.C. this 15th day of July, 1981.

/s/ [Illegible]

CERTIFICATE OF FILING AND SERVICE

I certify that on July 15, 1981 the foregoing Compensation Order was filed in the Office of the Deputy Commissioner, 40th Compensation District and a copy thereof was mailed on said date by certified mail to the parties and their representatives at the last known address of each as follows:

HOWARD EIGHMEY

28 Via De Roa Drive, Stafford, VA 22554

Claimant

LUMBERMENS MUTUAL CASUALTY CO.

8316 Arlington Blvd, Fairfax, VA 22030

Insurance Carrier or Employer

(if self-insured)

A copy was also mailed by regular mail to the following:

Director, Office of Workers' Compensation Programs,
(LHWCA), U.S. Department of Labor,
Washington, D.C. 20211

William F. Mulroney, Esq.

2000 L Street, NW

Suite 700

Washington, DC 20036

/s/ Janice V. Bryant

JANICE V. BRYANT

Deputy Commissioner

40th Compensation District

U.S. Department of Labor

EMPLOYMENT STANDARDS

ADMINISTRATION

Office of Workers' Compensation
Programs

If any compensation, payable under the terms of an award, is not paid within ten days after it becomes due, there shall be added to such unpaid compensation an

amount equal to 20 percent thereof. The additional amount shall be paid at the same time as, but in addition to, such compensation.

The date compensation is due is the date of the Deputy Commissioner filed the decision or order in his office.

[Attached as Exhibit B to WMATA's Motion for
Summary Judgment filed on August 20, 1982 in
*Wilmes v. Bechtel Civil and Minerals, Inc.,
et al.*, C.A. No. 81-0114]

U.S. DEPARTMENT OF LABOR
OFFICE OF WORKERS' COMPENSATION PROGRAMS
1717 K Street, N.W.
Washington, D.C. 20211

RE: File No. _____
Claimant Stanley D. Wilmes
Employer Healy-Ball-Granite
Accident Date January of 1978

Gentlemen:

This is to notify you that I am hereby making claim for workmen's compensation benefits and am filing this claim with you in accordance with Sections 13 and 19 of the Longshoremen's and Harbor Workers' Compensation Act, as extended, by the District of Columbia Workmen's Compensation Act.

I was injured while I was working at Shaft #4, Washington, D.C., Metro Subway.

The accident occurred as a result of exposure to silica and other noxious elements during the course of my employment.

I sustained the following injuries: silicosis.

Please be advised that I have retained Ashcraft, Gerel & Koonz to represent me in this claim, and it is understood that any attorney's fee will be approved by the Office of Workers' Compensation Programs.

Date: 8 October 1978

Very truly yours,

/s/ Stanley Wilmes
Claimant By His Attorney
Attorney handling case:

_____ Lee C. Ashcraft
_____ Joseph H. Koonz, Jr.
_____ James A. Mannino
_____ Mark L. Schaffer
XXXXXX Robert B. Adams
_____ Wayne M. Mansulla
_____ James F. Green
_____ William F. Mulronev
_____ Carolyn M. Endress
_____ David M. LaCivita

ASHCRAFT, GEREL & KOONZ
Attorneys at Law
2101 L Street, N.W., Suite 303
Washington, D.C. 20037
Telephone: 783-6400

[Attached as Exhibit B to WMATA's Motion for Summary Judgment filed on September 14, 1982 in *Buchanan v. Bechtel Civil and Minerals, Inc., et al.*, C.A. No. 81-3057]

U.S. DEPARTMENT OF LABOR
OFFICE OF WORKERS' COMPENSATION PROGRAMS
1111 - 20th Street, N.W., Suite 101
Washington, D.C. 20211

RE: File No. 139707

Claimant James H. Buchanan

Employer McLean-Grove-Skanska

Accident Date December 13, 1978

Gentlemen:

This is to notify you that I am hereby making claim for workmen's compensation benefits and am filing this claim with you in accordance with Sections 18 and 19 of the Longshoremen's and Harbor Workers' Compensation Act, as extended, by the District of Columbia Workmen's Compensation Act.

I was injured while I was working at Wisconsin Avenue, N.W., Metro tunnel.

The accident occurred when I was exposed to dust in the tunnel.

I sustained the following injuries: Lungs.

Please be advised that I have retained Ashcraft, Gerel & Koonz to represent me in this claim, and it is understood that any attorney's fee will be approved by the Office of Workers' Compensation Programs.

Date: September 27, 1979

Very truly yours,

/s/ James H. Buchanan

Claimant

Attorney handling case:

_____ Lee C. Ashcraft
 _____ Joseph H. Koonz, Jr.
 _____ James A. Mannino
 _____ Mark L. Schaffer
 _____ Robert B. Adams
 _____ Wayne M. Mansulla
 _____ James F. Green
 X William F. Mulroney
 _____ Carolyn M. Endress
 _____ David M. LaCivita
 _____ Allen J. Lowe

ASHCRAFT, GEREL & KOONZ
 Attorneys at Law
 2101 L Street, N.W., Suite 303
 Washington, D.C. 20037
 Telephone: 783-6400

U.S. DEPARTMENT OF COMMERCE
National Technical Information Service

PB-271 047

**GUIDELINES FOR IMPROVED RAPID TRANSIT
TUNNELING SAFETY AND ENVIRONMENTAL
IMPACT. VOLUME I. SAFETY**

(Attached as Exhibit to the Plaintiff's Supplemental
Opposition to Defendant WMATA's Motion for
Summary Judgment filed on August 5, 1982 in
*Johnson v. Bechtel Associates Professional
Corp., D.C., et al., C.A. No. 81-0968*)

A. A. Mathews, Inc, Rockville, Md.

Prepared for

Transportation Systems Center, Cambridge, Mass

Jan 77

UMTA-MA-06-0025-77-7

PB 271-047

REPORT NO. UMTA-MA-06-0025-77-7

**GUIDELINES FOR IMPROVED RAPID TRANSIT
TUNNELING SAFETY AND
ENVIRONMENTAL IMPACT
Volume I: Safety**

A.A. Mathews, Inc.
11900 Parklawn Drive
Rockville MD 20852

[SEAL]

JANUARY 1977

FINAL REPORT

**Document is Available to the U.S. Public
Through the National Technical Information Service,
Springfield, Virginia 22161**

Prepared for

**U.S. DEPARTMENT OF TRANSPORTATION
URBAN MASS TRANSPORTATION ADMINISTRATION
Office of Technology Development and Deployment
Office of Rail Technology
Washington DC 20590**

1. Report No. UMIA-MA-06-0025-77-7		2. Government Accession No.		3. Report's Catalog No.	
4. Title and Subtitle GUIDELINES FOR IMPROVED RAPID TRANSIT TUNNELING SAFETY AND ENVIRONMENTAL IMPACT Volume I: Safety				5. Report Date January 1977	
				6. Performing Organization Code	
7. Author(s) John D. Bladese and Arthur P. Chase				8. Performing Organization Report No. DOT-TSC-UMIA-77-2,1	
9. Performing Organization Name and Address A. A. Mathews, Inc.* 11900 Parklawn Drive Rockville, MD 20852				10. Stock Unit No. (78A41) MA-06-0025	
				11. Government or Other No. DOT-TSC-802-1	
12. Issuing Agency Name and Address U. S. Department of Transportation Urban Mass Transportation Administration 400 Seventh Street, S. W. Washington, D. C. 20390				13. Type of Report and Period Covered Volume I of II Volumes Final Report July 1976 - May 1976	
				14. Issuing Agency Code	
15. Supplementary Notes *All work performed under contract to:		U. S. Department of Transportation Transportation Systems Center Kendall Square Cambridge, MA 02142			
16. Abstract <p>Two of the major objectives of the Urban Mass Transportation Administration Tunneling Program are to lower subway construction costs and reduce construction hazards and damage to the environment. This study consists of a two-volume report and aims to develop guidelines for improved rapid transit tunneling safety and environmental impact, that is, this effort is directed toward underground construction applicable to modern transit subway systems in urban areas.</p> <p><u>Volume I: Safety.</u> Examination of construction safety regulations, tunnel construction accident data, and features of underground construction leading to unsafe work show that a systems approach to safety is required. Ten guidelines were drafted to supplement current construction safety regulations (OSHA 29CFR1926). Recommendations for further study and evaluation were made to complete the systems safety approach.</p> <p><u>Volume II: Environmental Impact.</u> Investigation of subway construction jobs shows that at least two principles underlie treatment of environmental problems. First, planning and design should consider both short-term and permanent damage to environment, and second, a need for better communication of contractor's planned activities and public concerns so that disruptions can be minimized. Guidelines were developed along these principles and are grouped into the following categories: general, community relations, and specific environmental control techniques.</p>					
17. Key Words a. Safety Underground Construction Safety Tunneling Safety Safety Statistics Guidelines			18. Distribution Statement Available to the Public through the National Technical Information Service Springfield, Virginia 22161.		
19. Security Classification (of this report) Unclassified		20. Security Classification (of this page) Unclassified		21. No. of Pages 117	
				22. Price PCARD \$01	

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NOTICE

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PREFACE

This study to develop guidelines for improved rapid transit tunneling safety and environmental impact, described in this two-volume report, was sponsored by the Office of Rail Technology of the Urban Mass Transportation Administration, Office of Technology Development and Deployment. The effort was conducted under contract with the Transportation Systems Center, Contract DOT-TSC-802, for the Urban Rail Supporting Technology Program.

Santo J. Gozzo was contract technical monitor for the Transportation Systems Center. John D. Bledsoe of A. A. Mathews, Inc. was Project Manager responsible for overall coordination and co-author with Arthur P. Chase of Volume I—Safety. Sylvia N. Morrison coordinated the workshop program to survey attitudes of interested agencies and organizations. William C. Shepherd, Sr. served as Project Manager for the initial work on Phase A. Andrew C. Lemer of Alan M. Voorhees and Associates, Inc. was principal investigator and co-author with C. Y. Chang of Volume II—Environmental Impact. Howard Wright and Sally D. Liff conducted significant portions of the research for this volume.

There are significant differences among problems and potential users of guidelines for safety and environmental impact. For this reason, results of this study are presented in two volumes, dealing respectively with safety and environment.

The investigators gratefully acknowledge the assistance and information furnished by staffs of the Bay Area Rapid Transit District, the Washington Metropolitan Area Transit Authority, Metro Insurance Administration for WMATA, the Metropolitan Atlanta Rapid Transit Authority, the National Loss Control Service Corporation, and the many professionals who contributed to the survey phase of the contractual effort.

• • • •

3.2 FEATURES CONTRIBUTING TO UNSAFE WORK

This subsection addresses those features of the underground construction industry which contribute to unsafe work. The term "industry" is used loosely, since the discussion considers all parties involved—owner, designer, insurer, contractor, workman, and regulatory agent. Three items are considered under general discussion; the remainder are divided among five categories used in this study to incorporate all aspects of underground construction safety into a system.

Lack of vested interests in safety—it is unfortunate that at the present time, not one of the parties responsible for or involved in the construction of tunnels has the cause of safety as its primary vested interest. For example:

The OWNER of an urban transit system is faced with the responsibility of completing construction of the system within a specified time and budget prepared at an early date. His funds are usually derived from the sale of bonds, allocations from jurisdictions, and subsidies from the Federal Government. It is awkward to approach any of these with a request for extension of either time or money. At the same time, the owner is often faced with problems resulting from optimistic cost estimates made during preliminary planning which have become obsolete because of changes in final design and inflation.

The primary concern of the DESIGNER is to produce a design and the necessary contract documents such that permanence of the structure is assured and that the cost of construction will be reasonable. Rarely, if ever, is the designer charged by the owner with making safety of construction a paramount issue in the design.

The CONTRACTOR won the contract because his was the lowest bid. He no doubt spent many hours in finding

ways wherein he could economize and thereby arrive at the winning lowest bid. Having won the contract, the contractor now has the responsibility of completing the work and producing a profit.

The LABOR UNION is primarily interested in securing work at the highest possible rate for its membership. Rarely does a labor union have funds to provide pre-work training for its membership.

The INSUROR is a financial institution and is therefore solely interested in increasing its revenue and reducing its obligations. Only to this extent is the insurer interested in construction safety.

REGULATORY AGENCIES are so concerned with the administration of published regulations set forth by their superiors that they often lose sight of their objectives.

The prime interests are essentially those stated above, and, unfortunately, *the cause of safety is often neglected.*

b. Safety measures considered as extra cost items—for the most part, the parties actually involved in tunnel construction view safety measures as added cost items. For reasons noted in the subsection immediately above, the contractor is usually dedicated to reducing all costs which are not "pay" items, or are not part of the Work. (Work as used here means the finished construction.)

The owner, for reasons noted above, is equally interested in preventing the cost of construction from rising.

The agencies charged with subsidizing urban transit tunnels find themselves with widespread demands for their limited resources.

It is therefore concluded that, at the present time, safety is viewed as an extra cost item by many of those parties with a direct interest in, and having the resources for, the construction of urban transit tunnels. It should

be noted that this conclusion applies equally to all tunnel construction.

c. Division of responsibility or inadequate coordination at construction site—study of the report of investigation of a recent explosion in modern tunnel construction (Reference 6) indicates that two prime contractors were working independently near opposite ends of a 6 mile tunnel at the time of an explosion. The tunnel had been driven through gassy shale. One contractor was working in the tunnel installing concrete lining. The other was working offshore, preparing to construct an inlet shaft to the tunnel. Either closer coordination between the contractors or control of all work under one authority might have prevented the mishap.

3.2.1 *Attitudes and Incentives*

Attitude and incentive of both contractor and workman is a complex subject in which factors are often inter-related. Following are items known to be important.

a. Contractor selection criteria—contractors are presently selected on the following basis:

1. Low bid
2. Balanced bid, or not so unbalanced as to disqualify
3. Sufficient capital or bonding capacity to assure job completion
4. Contractor's experience on similar jobs.

It should be noted that the contractor's safety record on previous jobs is absent from the criteria noted above. Only one case is known to the investigators wherein a contractor's previous safety record resulted in disqualification from bidding. The California Highway Department recently disqualified a contractor who had an unacceptable safety record.

b. Schedule of payments to the contractor—the contractor is usually faced with a cash flow problem at the

beginning of the contract. Even when progress payments are awarded for the mobilization of plant and equipment, they are rarely sufficient to cover actual costs. The contractor is therefore required to borrow money or invest from his own resources to cover the balance. It is typical for a contract to be about one-third finished before progress payments for completed work are sufficient for the contractor to reach the break-even point. Inflated interest rates intensify this problem. Therefore, the contractor's inclination, if indeed not his only recourse, is to curtail costs at contract initiation, and this includes costs relating to safety.

c. Role of insurance—system-wide insurance plans help isolate the contractor from his responsibilities for safety. As currently structured in the Washington Metropolitan Transit construction, the owner pays all premiums for both workmen's compensation and general liability insurance, leaving the contractor responsible for deductibles for each claim, and for such items as automobile liability equipment insurance. Similarly, the owner receives any dividends (rebates) which may be returned by the insurer. The contractor shares in neither the monetary penalty for unsafe work nor the benefit for safe work, except in a limited way.

d. Contractor's attitude toward safety statistics—occasionally, the contractor's staff is interested in enhancing safety statistics to the extent that lost time days are not fully reported. This is usually done by bringing anyone who has suffered an accident to the jobsite and keeping him on the payroll so long as he is able to perform some useful function. Although this provides the workman with more income than he would obtain from workman's compensation, it biases safety statistics. Reaction of workmen toward this practice appears mixed, partly adverse toward safety awards and programs and partly favorable toward the company for aid in maintaining a stable income while recuperating.

e. Workmen's attitude toward safe practices—it has been established (Reference 7) that workmen will accept voluntary risks more readily than involuntary risks. In other words, workmen will freely expose themselves to danger while, at the same time, they would resist being directed to exposure to the same danger by their foremen. The reasons for such motivation are not clear. It can be explained in part by the attitude of displaying masculinity by the disregard of personal safety. This has historically been a difficult problem to overcome, and the solution will only be accomplished when a way is found to make safe procedures and the use of safety equipment fashionable among construction workmen.

* * *

4.2.1 *Areas Not Covered by Safety Regulations*

Limitations of construction safety regulations are noted above. Hazards in tunnel construction and features contributing to unsafe work were enumerated in Section 3. In general terms, many safety problems have their origins in activities which either precede the actual construction, or which are only indirectly involved in construction.

Some specific areas not covered by safety regulations are:

- a. Definition of a safety program for both owner and contractor
- b. Selection of contractor
- c. Insurance programs for construction of complex multi-contract systems
- d. Scheduling of individual construction jobs in a large multi-contract system
- e. Specification of underground exploration prior to final design and construction

f. Criteria to be considered in final design and preparation of contract documents

g. Anticipation of and preparation for encountering natural hazards

h. Training and indoctrination of the work force.

In addition, there are factors such as safety standards for equipment and work under compressed air, for which existing regulations should be extended or modified.

4.2.2. *Systems Approach to Construction Safety*

Adequate construction safety regulations have been in effect for a long time, with no noticeable trend toward safer tunnel construction. It is therefore obvious that new elements must be introduced into the overall safety program for the situation to improve. A systems approach needs to be adopted for safety in underground construction.

* * * *

AGREEMENT

Among

**WASHINGTON METROPOLITAN AREA
TRANSIT AUTHORITY,**

LUMBERMENS MUTUAL CASUALTY COMPANY,

and

**NATIONAL LOSS CONTROL SERVICE
CORPORATION**

[Attached as Exhibit #6 to the Plaintiffs' Supplemental
Opposition to Defendant's Motion for Summary
Judgment filed on October 15, 1982 in
*Buchanan v. Bechtel Civil and
Minerals, Inc., et al.,*
C.A. 81-8057]

Agreement made as of the 30th day of July, 1971, among Washington Metropolitan Area Transit Authority, a public authority ("WMATA"), Lumbermens Mutual Casualty Company, an Illinois mutual insurance company ("LMC"), and National Loss Control Service Corporation, an Illinois corporation ("NATLSCO").

Witnesseth:

Whereas, WMATA issued specifications for a Coordinated Insurance Program dated April, 1971; and

Whereas, in response thereto LMC submitted to WMATA and Metro Insurance Administrators (MIA) a proposal (attached as Appendix A hereto) to provide workmen's compensation and general liability insurance, at a price and upon terms therein stated; and

Whereas, NATLSCO submitted to WMATA and MIA a proposal (attached as Appendix D hereto) to provide workmen's compensation and general liability insurance claim and loss control service at a price and upon terms therein stated; and

Whereas, WMATA desires to accept the said proposals of LMC and NATLSCO,

Now, Therefore, in consideration of the mutual promises herein contained, the parties hereto agree as follows:

SECTION A. LMC AGREES:

1. To provide workmen's compensation insurance and general liability insurance in substantial conformity with WMATA's specifications above described, subject to the terms stated in LMC's proposal set forth in Appendix A hereto. Policies for such insurance shall be issued to become effective at 12:01 A.M., EDT, July 30, 1971 unless otherwise agreed upon by the parties hereto. The premium for such insurance shall be calculated and paid in the manner set forth in Appendix A hereto.

2. To include Bechtel Corporation as an insured under the workmen's compensation and general liability policies aforesaid on one of the three alternatives set forth in Appendix B hereto, to be selected by WMATA. Provided, however, in the event WMATA fails to inform LMC of its selected alternative within 30 days from the date of this Agreement, alternative A in Appendix B hereto shall be deemed to have been selected.

3. To provide construction contract surety bonds to small business and minority enterprises as requested by WMATA, subject to the terms of Appendix C hereto. The premium for such bonds shall be determined in accordance with LMC's applicable manuals, rules and rates in effect at the time of issuance. The premium and any SBA fee shall be payable by the principal under such bonds.

4. To accept NATLSCO and its claim and loss control services as meeting LMC's requirements set forth on the page of Appendix A hereto, entitled "Special Servicing Requirements".

SECTION B. NATLSCO AGREES:

1. To provide workmen's compensation and general liability insurance loss control services consisting of the following:

(a) services of NATLSCO's Safety Services Division Manager on a two day per month basis to provide a periodic overview and evaluation of NATLSCO's total control assistance efforts.

(b) services of a full-time resident loss control service manager to provide daily supervision and direction of NATLSCO's loss control assistance efforts.

(c) services of full-time loss control field consultants to perform regular on-site safety inspections and to provide other appropriate assistance to

WMATA in the development and implementation of its Metro System Safety Program. The number of field consultants will generally be maintained at a ratio of 1 consultant for each 10 heavy construction contracts.

(d) services of industrial hygienists and occupational health consultants, where appropriate or when specifically requested by WMATA, to evaluate occupational disease exposure and to assist in the development of necessary first aid and medical facilities, procedures and records.

2. To provide workmen's compensation and general liability claim services as follows:

(a) services of a full-time resident claim service manager to provide daily supervision and direction of NATLSCO's claim service efforts.

(b) services of full-time claim supervisors, claim adjusters and claim clerical personnel in sufficient numbers to adequately handle the volume of workmen's compensation and general liability claims with respect to which insurance is afforded under the terms of this Agreement.

(c) claim reporting procedures, investigation of all reported claims, establishment of appropriate claim files and reports, authorization of claim payments, assistance to attorneys selected by LMC and other functions usual to the rendering of insurance related claim service.

3. That NATLSCO's service fee for the above-described loss control and claim services will be at the rate of \$0.9377 per \$100.00 of payroll. The term "payroll" means the audited workmen's compensation payroll for all employees covered under the subject LMC insurance plan for WMATA. NATLSCO will bill WMATA on a monthly basis for an amount equal to one-twelfth

of its total estimated annual service fee for a given year. Final adjustment of the total annual service fee will be subject to a payroll audit. It is also agreed that the annual service fee for any given year will be appropriately adjusted for variations in actual assigned claim service manpower from that estimated in NATLSCO's "Proposed Loss Control & Claim Services to WMATA", (Appendix D, hereto).

4. That all services set forth in Appendix D hereto shall be furnished by NATLSCO and in the event of conflict between those terms and the terms set forth in the foregoing paragraphs 1 through 3, the terms of Appendix D shall control.

SECTION C. WMATA AGREES:

1. To pay all service fees, premiums and advance premiums when due, as provided in this Agreement.

2. To reasonably and faithfully perform its safety obligations, and to give good faith consideration to the recommendations of NATLSCO in the performance of its loss control services.

3. To apply to the District of Columbia City Council for a specific waiver of a regulation limiting the cancellation of insurance policies in the District of Columbia which became effective May 1, 1971, to the extent that such regulation relates to this Agreement or to the insurance agreed to be provided herein.

SECTION D. THE PARTIES HERETO MUTUALLY AGREE:

1. That the insurance and services to be provided hereunder shall be effective at 12:01 A.M., EDT, July 30, 1971. Subject to the terms of Appendix A, on the page entitled "General Comment", and to the terms of policies of insurance issued pursuant to this Agreement, and to the terms of cancellation hereinafter provided, this Agreement shall continue in force until 12:01 A.M.,

EDT, July 1, 1974 whereupon it shall terminate. Provided, however, the insurance agreed to be provided under the terms of Appendix C shall be effective at such dates and shall be issued for such terms as shall be appropriate under the circumstances, and such insurance shall not otherwise be subject to the terms of this paragraph D1.

2. That this Agreement may be terminated by any party hereto by giving to the other parties written notice stating when, not less than 90 days thereafter, such cancellation shall be effective. Provided, however,

(a) Any policy of insurance issued pursuant to this Agreement may be cancelled in the manner provided in such policy, except that as respects cancellation by WMATA or by LMC of any workmen's compensation or generally liability policy, not less than 90 days notice shall be given.

(b) In the event of cancellation of this Agreement by WMATA for any reason other than a cancellation of workmen's compensation or general liability insurance by LMC, WMATA agrees to fully reimburse NATLSCO for its various unrecoverable start-up expenses incurred in the establishment of special office facilities and staff in Washington, D.C. These will amount to \$218,000 if cancellation is made during the first year and then decreasing uniformly down to \$28,000 at the end of the second year. Provided, however, that this subparagraph (b) shall not apply to any cancellation by WMATA effective on or after July 30, 1973.

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be signed and attested on their behalf by their duly authorized officers under their respective corporate seals on the day first above written.

WASHINGTON METROPOLITAN AREA
TRANSIT AUTHORITY

By /s/ DELMER ISON
Title: Contracting Officer

ATTEST:

/s/ [Illegible]
Title: Asst. Sec.

LUMBERMENS MUTUAL CASUALTY
COMPANY

By /s/ [Illegible]
Title: Vice President

ATTEST:

/s/ [Illegible]
Title: Secretary

NATIONAL LOSS CONTROL SERVICE
CORPORATION

By /s/ [Illegible]
Title: President

ATTEST:

/s/ [Illegible]
Title: Secretary

KEMPER
Insurance

Mutual Insurance Building • Chicago 40

Longbeach 1-8000

May 17, 1971

Mr. Arthur V. Erickson
Metro Insurance Administrators
955 L'Enfant Plaza S.W.
Room 8209
Washington, D.C. 20024

Dear Art:

**WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY
WORKMEN'S COMPENSATION & GENERAL LIABILITY
PROPOSAL EFFECTIVE 7-1-71**

It is a pleasure to submit our proposal for this insurance. The attachments explain our pricing methods, coverages, services and requirements in accordance with the specifications for the Coordinated Insurance Program dated April 1971. In those areas where we have departed from the specifications, proper explanation has been given.

It is our earnest desire to be awarded this business and enjoy a continuous, profitable and mutually advantageous relationship.

Cordially

/s/ S. E. Asquith
S. E. ASQUITH
Special Risks Underwriting Department
397-7-B88

APPENDIX A

prepared for

**WASHINGTON METROPOLITAN AREA
TRANSIT AUTHORITY**

submitted by

**METRO INSURANCE ADMINISTRATORS
955 L'ENFANT PLAZA S.W.
ROOM 3209
WASHINGTON, D.C. 20024**

[SEAL]

General Statement

This proposal is offered on behalf of Lumbermens Mutual Casualty Company.

A single quotation consisting of two parts follows:

1. **Primary Plan.** The National Defense Projects Rating Plan, with certain modifications to recognize special service provisions, is the basis of this part applying to both Workmens Compensation and General Liability.
2. **Excess Plan.** This is a normal excess plan for general liability limits in excess of limits included in the primary plan.

Those services normally provided for Loss Control Engineering and Claim handling will not be provided under the program and must be contracted for separately. Minimum standards of such services are incorporated later in the proposal.

We will assist WMATA in the development of a program to provide construction contract surety bonds to small business and minority enterprises. We will participate in such a program.

Primary Rating Plan

Plan Premium

Term	— 3 years cumulative 7-1-71 to 7-1-74
Basic Premium Factor	— 4.5% of Plan Premium
Tax Factor	— 1.03 estimated. Determined annually from rating manuals and applied separately by coverage and by state per retrospective rating plan rules.
Minimum	— Basic Premium x Taxes

- Maximum — Plan Premium
Payrolls x Rate
- Loss Limitation — Workmens Compensation
\$1,000,000 per accident
including allocated loss
expense
General Liability
\$1,000,000 per occurrence,
including allocated loss
expense
- Loss Conversion Factor — None
- Net Cost Formula — Maximum Premium less
(.045 of Maximum Premium
plus limited losses, including
allocated loss expenses) x Tax
Factors.)
- Premium Adjustments — Six months following the first
anniversary of the plan, and
each 12 months thereafter on
a cumulative basis, until all
claims are closed or WMATA
and the Company mutually
agree to a final determination.

*Premium Calculation**Plan Premium*

Period	Coverage	Payroll Estimate	Rate	Premium
7-1-71	WC	20,641,600	6.72	1,387,116
7-1-72	GL	20,641,600	4.89	1,009,374
			TOTAL	2,396,490
7-1-72	WC	105,733,300	6.53	6,904,384
7-1-73	GL	105,733,300	4.89	5,170,358
			TOTAL	12,074,742
7-1-73	WC	174,459,800	5.94	10,362,912
7-1-74	GL	174,459,800	4.89	8,531,084
			TOTAL	18,893,996

Three Year Total \$33,365,228

Payroll estimates and WC rate to be redetermined prior to 7-1-72 and 7-1-73 anniversary.

*Premium Calculation**Excess Plan*

Period	Payroll Estimate	Rate	Maximum Premium *	Minimum Premium *
7-1-71 to 7-1-72	20,641,600	1.55	319,945	239,959
7-1-72 to 7-1-73	105,733,300	1.55	1,638,866	1,229,150
7-1-73 to 7-1-74	174,459,800	1.55	2,704,127	2,028,095
			4,662,938	3,497,204

* In addition to the premiums shown above, there shall be added a flat amount representing 108% of the net cost to the company of facultative re-insurance. These premiums will not be subject to adjustment for experience.

The cost to us is $\$250,000 \times 1.08 = \$270,000$ cost to WMATA.

Premium includes taxes.

Rate guaranteed for the term of the plan and applies per \$100. of WC payroll

The premium will be adjusted on the basis of:

Incurred losses, including allocated loss expense $\div .50$
(Subject to Minimum & Maximum)

Return premium adjustments will be made to the escrow account.

*Rate Development**Workmens Compensation*

District of Columbia manual rates will be used to develop a composite rate. Such rate will apply for a period of 12 months and will be revised annually. The rate will be adjusted mid-term only in the event that a District of Columbia benefit level change results in a mid-term percentage rate change (as promulgated by the National Council) for application to all other Workmens Compensation policy-holders.

Appendix A [con't]

The formula for producing this rate is:

- A. Manual rates X estimated payrolls by classification
- B. Premium produced above \div payroll used above
- C. Rate = .56 X rate produced in B above X Tax 1.028

Data in the specifications result in the following rates:

Year	Payroll	Manual Premium	Manual Rate	Policy Rate
7-1-71/72	20,641,600	2,408,893	11.67	6.72
7-1-72/73	105,733,300	12,005,376	11.35	6.55
7-1-73/74	174,459,800	17,996,407	10.32	5.94

Rates for the 1972 and 1973 years are shown for illustrative purposes only. For these years, rates then current will be applied to revised estimates of payroll by classification to produce the rate for these years in accordance with the formula above.

General Liability

This composite rate was promulgated by the Company specifically for this exposure. The rate applies per \$100. of payroll and is guaranteed for three years.

Note: Payroll for both coverages shall be Workmens Compensation payroll subject to all rules pertaining to overtime, limitation, etc. that apply in the District of Columbia.

Cancellation Provisions

Cancellation or non-renewal of any policy written under this rating plan shall cancel the plan, and premium adjustments shall be computed as follows:

Appendix A [con't]

- A. By WMATA. The plan premium for the period the policies are in force shall be computed from the actual audited payrolls.

If the cancellation occurs within the first year, or on the first anniversary, the premiums will be surcharged 40%. During the second year and on the second anniversary, a 25% surcharge will apply. A 10% surcharge will apply during the third year. No further premium adjustments shall be made.

The Excess premium will be computed on a short rate basis.

- B. By the Company. All premiums will be computed on a pro rata basis.

Special Servicing Requirements

Lumbermens Mutual Casualty Company does not contemplate providing Loss Control Engineering or Claim service and the pricing has been adjusted for this. Such services are required but must be contracted and provided separately.

Services required must be of a type and quality that would otherwise be offered by Lumbermens Mutual Casualty Company and be compatible [sic] with our data processing needs. Accordingly, Lumbermens Mutual Casualty Company must approve WMATA's selection of the contractor who shall perform these services.

KEMPER

Insurance

Mutual Insurance Building • Chicago 60640

Telephone 561-800 (Area 312)

July 21, 1971

**Mr. Arthur V. Erickson
Metro Insurance Administrators
955 L'Enfant Plaza S.W.
Room 3209
Washington, D.C. 20024**

Dear Art:

**WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY
SURETY BONDS**

**The following is an addendum to our Casualty Proposal.
The General Statement as related to construction contract
surety bonds for small business and minority enterprises
contemplates the following:**

- A. Extension of the Small Business Administration
Surety Bond Guarantee Program to the Wash-
ington, D.C. area whereby the SBA will provide
90% indemnity for any loss and we will retain
the remaining 10%.**
- B. WMATA will not accept bids from such contrac-
tors whose bids are obviously deficient.**
- C. Both WMATA and SBA will look to us to care-
fully underwrite these bonds.**
- D. No such bonds will be offered to the SBA with-
out our underwriting approval.**

E. Our commitment is limited to those bonds which come under the terms of the SBA program—namely, bid, performance and payment bonds.

Cordially,

/s/ S. E. Asquith
S. E. ASQUITH
Special Risk Underwriting Department
81-7-955

4750 Sheridan Road. Chicago 60640. Tel 312-248-1559

NATIONAL LOSS CONTROL SERVICE CORPORATION

May 25, 1971

Mr. Arthur V. Erickson
Johnson & Higgins
95 Wall Street
New York, New York 10005

Dear Mr. Erickson:

Confirming Lou Regine's recent conversation with you, the following represents a projection of our probable three year loss control and claim service fees for Washington Metropolitan Area Transit Authority at various assumed loss levels:

<u>Assumed 3 Year WC and GL Losses</u>	<u>Total Probable NATLSCO Service Fees</u>
2,500,000	1,362,000
5,000,000	1,524,000
10,000,000	1,848,000
15,000,000	2,173,000
20,000,000	2,497,000
25,000,000	2,821,000
30,800,000	2,821,000

In developing this comparative breakdown, it was assumed that our loss control service fee would remain constant at all loss levels and that 30% of our projected claim service fee would essentially remain unresponsive to changes in the loss level. It was further assumed that the remaining 70% of our claim service fee would vary in direction proportion to differences in loss levels between 0 and \$25,000,000.

As total dollar losses between any two levels obviously do not necessarily reflect corresponding differences in actual claim expenses as between these levels, it should be understood that these data are being supplied to you at this time solely for the purpose of permitting you to make

APPENDIX D

an approximate comparison of our probable service costs with those of the other two competing organizations.

Our actual service fees will directly reflect the specific claim service manpower and facilities which will be provided by us to handle the actual volume and mix of Workmen's Compensation and General Liability claims which are generated within the Washington Metropolitan Area Transit Authority program over the three year contract period. At any given loss level, this may result in a lower or higher service fee than that indicated in the previously outlined tabulation.

Trusting that this information satisfies your needs in this area, I remain

Yours very truly,

/s/ Gerald L. Maatman
GERALD L. MAATMAN
President
GLM:mi

Environmental Evaluation
Industrial Hygiene Laboratory
Safety and Accident Control
Industrial & Municipal Fire Protection
Boiler & Machinery Service
Alcoholism & Behavioral Problem Surveys

Appendix D [con't]

WASHINGTON METROPOLITAN AREA
TRANSIT AUTHORITY

By /s/ Delmer Ison
(Title) Contracting Officer

Attest: [Illegible]
(Title)

Date: September 27, 1978

NATIONAL LOSS CONTROL SERVICE
CORPORATION

By /s/ R. W. Satterfield
(Title) President

Attest: [Illegible]
(Title) Ass't. Secretary

[SEAL]

WASHINGTON
METROPOLITAN
AREA TRANSIT
AUTHORITY

INSURANCE
SPECIFICATIONS
FOR
CONSTRUCTION
PROJECTS

[Attached as Exhibit #5 to the Plaintiff's Supplemental
Opposition to Defendant's Motion for Summary
Judgment filed on October 15, 1982 in
*Buchanan v. Bechtel Civil and
Minerals, Inc., et al.,*
C.A. No. 81-3057]

NOVEMBER 1973

INSURANCE SPECIFICATIONS
FOR
CONSTRUCTION PROJECTS

TABLE OF CONTENTS

Introduction	
Definitions	
General Description of the Insurance Program	
Special Provisions of the Insurance Program	
Appendix A—Workmens Compensation and Employees Liability	
Appendix B—Comprehensive General Liability	
Appendix C—Builder's Risk	

**SPECIFICATIONS OF THE
COORDINATED INSURANCE PROGRAM OF
SPECIFICATIONS OF THE
WASHINGTON METROPOLITAN AREA
TRANSIT AUTHORITY**

(November 1973 Edition)

INTRODUCTION

The Coordinated Insurance Program is a method of guaranteeing that all contractors and subcontractors of whatever tier and the Washington Metropolitan Area Transit Authority are covered for Statutory Workmen's Compensation-Employer's Liability Insurance (D.C. benefits), Comprehensive General Liability, including Products Insurance & All Risk Builders Risk Insurance. These policies DO NOT cover automobile liability insurance, and this coverage must be secured by the contractor at his own expense and through his own efforts. Appendices A, B & C of this document provide the primary policies of the Coordinated Insurance Program made available to contractors and subcontractors by WMATA. Excess policies, referred to on Page 4, Section C, are also purchased by WMATA. Copies are available for inspection at the offices of Metro Insurance Administrators. The contractors may, at their own expense and effort, obtain any other insurance they deem necessary.

Insurance premium costs for the coverages provided are paid by WMATA and contractors are expected to recognize this fact when submitting their bids.

Any questions pertaining to these Insurance Specifications should be directed to:

**Director
Metro Insurance Administrators
955 N. L'Enfant Plaza, S.W., Suite 6077
Washington, D.C. 20024
Telephone: 202, 484-3166**

DEFINITIONS

A. WORKMEN'S COMPENSATION, EMPLOYERS' LIABILITY AND COMPREHENSIVE GENERAL LIABILITY. The following definitions apply:

1. *Contractor* means Authority's contractor and his subcontractors of any tier who perform operations at the construction site.
2. *Construction Site* means those areas described in a contract between WMATA and the contractor, including authorized or approved additional sites necessary or incidental thereto.
3. *Subcontractor* means any individual, firm, venture or corporation undertaking construction or other services requiring labor at or from the construction site. Subcontractor shall not mean Authority's contractor or vendors, suppliers, material dealers or others who merely transport matter, materials, parts of equipment to or from the construction site.
4. Contractor or subcontractor *does not mean* any of the following:

For the purposes of this insurance, contractor or subcontractor does not mean or include coverage for any privately owned publicly regulated utility company.

5. Contractor or subcontractor *does not mean* any demolition contractor with a contract let by the WMATA Office of Real Estate. If such demolition contractor is a subcontractor to a contractor as defined above, such demolition contractor is insured hereunder.

B. BUILDERS RISK INSURANCE

With respect to Builders Risk Insurance (Appendix C), the following definitions shall apply:

1. *Contractor* means any individual, firm, venture or corporation performing on behalf of the Authority either a construction contract or a contract for furnishing or installing equipment or materials.
2. *Subcontractor* means any individual, firm, venture or corporation performing on behalf of the Authority's contractor a contract for furnishing or installing equipment and materials.

GENERAL DESCRIPTION OF THE INSURANCE PROGRAM

The Authority will, for the benefit of contractors and others, procure and pay premiums for the insurance coverages described below in items A, B, C, D and E.

A. *Workmens Compensation and Employers' Liability Insurance*—with limits of liability as follows:

1. Workmens Compensation Coverage—statutory
2. Employers' Liability with limits of:
 - \$1,000,000 each person
 - \$1,000,000 each accident or disease—each insured
 - \$5,000,000 each accident or disease—for all insured combined

See Appendix A for full policy wording

B. *Comprehensive General Liability Insurance*—with combined single limits of liability as follows:

\$5,000,000 each occurrence—each insured
 \$25,000,000 each occurrence—for all insured
 combined
 \$5,000,000 annual aggregate—each insured

See Appendix B for full policy wording

- C. *Excess Liability Insurance*—\$45,000,000 each accident or occurrence/\$45,000,000 annual aggregates in excess of the underlying limits and terms as set forth in Appendices A and B and limits available to the Washington Metropolitan Area Transit Authority under certain other policies. Regardless of the amount of any claim for damages; the number of insureds covered; or the number of underlying policies, the total limit of the excess coverage provided shall not exceed \$45,000,000 for all damages arising out of one accident or occurrence.
- D. *Builders Risk Insurance*—limit of \$30,000,000 in the form and subject to the provisions of Appendix C. The portion of any loss falling within the deductible provisions specified in Appendix C will be self-insured by the Authority for the benefit of all insureds under the Authority's insurance policies, except that the Contractor and/or his subcontractor(s) will be responsible for the first \$10,000 of any claim(s) arising out of one occurrence in which the Contractor and/or his subcontractor(s) have an insurable interest.

See Appendix C for full policy wording

- E. *Railroad Protective Liability Insurance*—as required and in connection with a contractor's performance on railroad property under his contract.

NOTE: Certificates of Insurance evidencing the above coverages will be issued as required on

behalf of those contractors and subcontractors covered by the policies.

SPECIAL PROVISIONS OF THE INSURANCE PROGRAM

- A. Contractor shall, within 60 days after the award of the contract, supply the Contracting Officer with a lump sum estimate of all wages, *excluding fringe benefits*, to be reported under the Davis-Bacon Act (40 U.S.C. 276-a(7)) during the performance of this contract including wages of the contractor and subcontractor of any tiers.
- B. The insurances by WMATA (except for the All Risk Course of Construction Insurance) applies only to the operations of, and for, each contractor at and from the construction site and any other approved site. It does not apply to the operations of any contractor in his regularly established main or branch office, factory, warehouse, or similar place nor to any employees of such operations.
- C. Loss, if any, covered by All Risk Course of Construction Insurance is to be made adjustable with and payable to the Authority.
- D. The Authority reserves the right to change the terms and conditions of its Insurance Program, provided, however, that no changes may be made which, in the opinion of the Authority, substantially reduce the coverage set forth in these Insurance Specifications.
- E. If any insurance company providing coverage cancels such insurance, the Authority shall give all contractors insured thirty (30) days' written notice of cancellation. In the event of such cancellation, the Authority shall, at its option, at

least five days prior to the effective date of cancellation:

procure alternate insurance coverage for the policy or policies cancelled; or require contractor to procure and maintain alternate insurance coverage for the policy or policies cancelled, the amounts, policy wording and insurance company shall be satisfactory to the Authority. Authority will reimburse contractor for the actual premiums for contractor's alternate insurance coverage. In the event of such cancellation, these Insurance Specifications shall remain in full force and effect except for those portions which in the opinion of the Authority, conflict with said alternate insurance coverage.

- F. Assignment—Upon the request of the Contracting Officer, the contractor and each of his subcontractors shall execute an assignment for the benefit of the Authority, in a form to be approved by the Authority, of any return premiums, premium refunds, dividends and any other moneys due or to become due in connection with the insurance which the Authority herein agrees to provide.
- G. There is no other type of insurance and no higher limits than those described herein. Any increase in limits of liability or any other type of insurance not described above which the contractor or any of his subcontractors obtain for their own protection or because of statute shall be their own responsibility and at their own expense.
- H. The contractor and his subcontractors shall cooperate with and assist in every possible manner the representatives of the Authority, its consult-

ants, insurance representatives and the insurers of the policies described in the Specifications with respect to:

1. The implementation of the Authority's Co-ordinated Safety and Loss Control Program; and
 2. The adjustment of all claims arising out of operations within the scope of the contract, including the litigation of such claims.
- I. The contractor shall at all times cooperate with and assist the insurance companies issuing any of the policies of insurance mentioned in the Specifications in the preparation of all necessary pertinent payroll audits for the purpose of developing and determining all premiums thereunder, and shall keep records relating to the contract work in such manner that said records can readily be separated from other work the contractor is doing. In order to enable the Authority to verify the premiums to be developed by the insurance companies, the contractor shall make available to insurance company's auditors, at the construction site, all payroll data for the contract work for the period being audited.
- J. The provisions of the Insurance Specifications as described shall apply to the contractor and his subcontractors of any tier, and these Insurance Specifications shall be incorporated in any contract or agreement between the contractor and subcontractors of any tier who perform work under this contract.
- K. Prime Contractors are required to notify the Metro Insurance Administrators (MIA) of the award of any subcontract of whatever tier for the performance of operations at construction site. The notices to MIA should be made on

Prime Contractor's letterhead, numbered consecutively, follow the form and contain the information as outlined below:

LETTERHEAD OF PRIME CONTRACTOR

Metro Insurance Administrators
955 N. L'Enfant Plaza, Suite 6077
Washington, D.C. 20024

Re: WMATA Prime Contract No. _____
Letter Number _____
Notice of Contract Award and
Request for Insurance

Gentlemen:

A contract has been awarded to the contractor named below:

NAME OF CONTRACTOR: _____

ADDRESS OF CONTRACTOR: _____

TYPE OF WORK: _____

REPRESENTATIVE: _____

TELEPHONE NO. _____

DATE OF CONTRACT: _____

ESTIMATED CONTRACT AMOUNT: _____

PROBABLE STARTING DATE: _____

Please send Certificates of Insurance or policies evidencing coverage to the above named contractor.

PRIME CONTRACTOR

By _____

not include those provisions of any such law which provide non-occupational disability benefits.

(b) State. The word "state" means any State or Territory of the United States of America and the District of Columbia.

(c) Bodily Injury by Accident; Bodily Injury by Disease. The contraction of disease is not an accident within the meaning of the word "accident" in the term "bodily injury by accident" and only such disease as results directly from a bodily injury by accident is included within the term "bodily injury by accident." The term "bodily injury by disease" includes only such disease as is not included within the term "bodily injury by accident."

(d) Assault and Battery. Under coverage B, assault and battery shall be deemed an accident unless committed by or at the direction of the insured.

IV. Application of Policy

This policy applies only to injury (1) by accident occurring during the policy period, or (2) by disease caused or aggravated by exposure of which the last day of the last exposure, in the employment of the insured, to conditions causing the disease occurs during the policy period.

EXCLUSIONS

This policy does not apply:

(a) under coverages A and B, to operations conducted at or from any workplace not described in Item 1 or 4 of the declarations if the insured has, under the workmen's compensation law, other insurance for such operations or is a qualified self-insurer therefor;

(b) under coverages A and B, unless required by law or described in the declarations, to domestic employment or to farm or agricultural employment;

(c) under coverage B, to liability assumed by the insured under any contract or agreement, but this exclusion does not apply to warranty that work performed by or on behalf of the insured will be done in a workmanlike manner;

(d) under coverage B, (1) to punitive or exemplary damages on account of bodily injury to or death of any employee employed in violation of law, or (2) with respect to any employee employed in violation of law with the knowledge or acquiescence of the insured or any executive officer thereof;

(e) under coverage B, to bodily injury by disease unless prior to thirty-six months after the end of the policy period written claim is made or suit is brought against the insured for damages because of such injury or death resulting therefrom;

(f) under coverage B, to any obligation for which the insured or any carrier as his insurer may be held liable under the workmen's compensation or occupational disease law of a state designated in Item 3 of the declarations, any other workmen's compensation or occupational disease law, any unemployment compensation or disability benefits law, or under any similar law.

CONDITIONS

(Unless otherwise noted, conditions apply to all Coverages.)

1. Premium. The premium bases and rates for the classifications of operations described in the declarations are as stated therein and for classifications not so described are those applicable in accordance with the manuals in use by the company. This policy is issued by the company and accepted by the insured with the agreement that if any change in classifications, rates or rating plans is or be-

comes applicable to this policy under any law regulating this insurance or because of any amendments affecting the benefits provided by the workmen's compensation law, such change with the effective date thereof shall be stated in an endorsement issued to form a part of this policy.

When used as a premium basis, "remuneration" means the entire remuneration, computed in accordance with the manuals in use by the company, earned during the policy period by (a) all executive officers and other employees of the insured engaged in operations covered by this policy, and (b) any other person performing work which may render the company liable under this policy for injury to or death of such person in accordance with the workmen's compensation law. "Remuneration" shall not include the remuneration of any person within division (b) foregoing if the insured maintains evidence satisfactory to the company that the payment of compensation and other benefits under such law to such person is secured by other valid and collectible insurance or by any other undertaking approved by the governmental agency having jurisdiction thereof.

If the declarations provide for adjustment of premium on other than an annual basis, the insured shall pay the deposit premium to the company upon the inception of this policy and thereafter interim premiums shall be computed in accordance with the manuals in use by the company and paid by the insured promptly after the end of each interval specified in the declarations. The deposit premium shall be retained by the company until termination of this policy and credited to the final premium adjustment.

The insured shall maintain records of the information necessary for premium computation on the bases stated in the declarations, and shall send copies of such records to the company at the end of the policy period and at such times during the policy period as the company may direct. If the insured does not furnish records of the remunera-

tion of persons within division (b) of the definition of remuneration foregoing, the remuneration of such persons shall be computed in accordance with the manuals in use by the company.

The premium stated in the declarations is an estimated premium only. Upon termination of this policy, the earned premium shall be computed in accordance with the rules, rates, rating plans, premiums and minimum premiums applicable to this insurance in accordance with the manuals in use by the company. If the earned premium thus computed exceeds the premium previously paid, the insured shall pay the excess to the company; if less, the company shall return to the insured the unearned portion paid by the insured. All premiums shall be fully earned whether any workmen's compensation law, or any part thereof, is or shall be declared invalid or unconstitutional.

2. Long Term Policy. If this policy is written for a period longer than one year, all the provisions of this policy shall apply separately to each consecutive twelve months period, or, if the first or last consecutive period is less than twelve months, to such period of less than twelve months, in the same manner as if a separate policy had been written for each consecutive period. The earned premium for each such period shall be computed as provided by Condition 1 of this policy, subject, except as otherwise provided in the manuals in use by the company with respect to classifications of operations for which this policy provides a per capita premium basis, to the following provisions:

(a) The premium rates for the first consecutive period shall be those stated in the declarations and those applicable for such period in accordance with the manuals in use by the company;

(b) The premium bases, classifications of operations, rates, rating plans, premiums and minimum premiums for each such subsequent period shall be those applicable

for such period in accordance with the manuals in use by the company.

3. Partnership or Joint Venture as Insured. If the insured is a partnership or joint venture, such insurance as is afforded by this policy applies to each partner or member thereof as an insured only while he is acting within the scope of his duties as such partner or member.

4. Inspection and Audit. The company and any rating authority having jurisdiction by law shall each be permitted but not obligated to inspect at any reasonable time the workplaces, operations, machinery and equipment covered by this policy. Neither the right to make inspections nor the making thereof nor any report thereon shall constitute an undertaking on behalf of or for the benefit of the insured or others, to determine or warrant that such workplaces, operations, machinery or equipment are safe.

The company and any rating authority having jurisdiction by law shall each be permitted to examine and audit the insured's payroll records, general ledger, disbursements, vouchers, contracts, tax reports and all other books, documents and records of any and every kind at any reasonable time during the policy period and any extension thereof and within three years after termination of this policy, as far as they show or tend to show or verify the amount of remuneration or other premium basis, or relate to the subject matter of this insurance.

5. Notice of Injury. When an injury occurs written notice shall be given by or on behalf of the insured to the company or any of its authorized agents as soon as practicable. Such notice shall contain particulars sufficient to identify the insured and also reasonably obtainable information respecting the time, place and circumstances of the injury, the names and addresses of the insured and of available witnesses.

6. Notice of Claim or Suit. If claim is made or suit or other proceeding is brought against the insured, the in-

sured shall immediately forward to the company every demand, notice, summons or other process received by him or his representative.

7. Assistance and Cooperation of the Insured. The insured shall cooperate with the company and, upon the company's request, shall attend hearings and trials and shall assist in effecting settlements, securing and giving evidence, obtaining the attendance of witnesses and in the conduct of suits or proceedings. The insured shall not, except at his own cost, voluntarily make any payment, assume any obligation or incur any expense other than for such immediate medical and other services at the time of injury as are required by the workmen's compensation law.

8. Statutory Provisions, Coverage A. The company shall be directly and primarily liable to any person entitled to the benefits of the workmen's compensation law under this policy. The obligations of the company may be enforced by such person, or for his benefit by any agency authorized by law, whether against the company alone or jointly with the insured. Bankruptcy or insolvency of the insured or of the insured's estate, or any default of the insured, shall not relieve the company of any of its obligations under coverage A.

As between the employee and the company, notice or knowledge of the injury on the part of the insured shall be notice or knowledge, as the case may be, on the part of the company; the jurisdiction of the insured, for the purposes of the workmen's compensation law, shall be jurisdiction of the company and the company shall in all things be bound by and subject to the findings, judgments, awards, decree, orders or decisions rendered against the insured in the form and manner provided by such law and within the terms, limitations and provisions of this policy not inconsistent with such law.

All of the provisions of the workmen's compensation law shall be and remain a part of this policy as fully and

completely as if written herein, so far as they apply to compensation and other benefits provided by this policy and to special taxes, payments into security or other special funds, and assessments required of or levied against compensation insurance carriers under such law.

The insured shall reimburse the company for any payments required of the company under the workmen's compensation law, in excess of the benefits regularly provided by such law, solely because of injury to (a) any employee by reason of the serious and wilful misconduct of the insured, or (b) any employee employed by the insured in violation of law with the knowledge or acquiescence of the insured or any executive officer thereof.

Nothing herein shall relieve the insured of the obligations imposed upon the insured by the other terms of this policy.

9. Limits of Liability, Coverage B. The words "damages because of bodily injury by accident or disease, including death at any time resulting therefrom," in coverage B include damages for care and loss of services and damages for which the insured is liable by reason of suits or claims brought against the insured by others to recover the damages obtained from such others because of such bodily injury sustained by employees of the insured arising out of and in the course of their employment. The limit of liability stated in the declarations for coverage B is the total limit of the company's liability for all damages because of bodily injury by accident, including death at any time resulting therefrom, sustained by one or more employees in any one accident. The limit of liability stated in the declarations for coverage B is the total limit of the company's liability for all damages because of bodily injury by disease, including death at any time resulting therefrom, sustained by one or more employees of the insured in operations in any one state designated in Item 3 of the declarations or in operations necessary or incidental thereto.

The inclusion herein of more than one insured shall not operate to increase the limits of the company's liability.

10. Action Against Company, Coverage B. No action shall lie against the company unless, as a condition precedent thereto, the insured shall have fully complied with all the terms of this policy, nor until the amount of the insured's obligation to pay shall have been finally determined either by judgment against the insured after actual trial or by written agreement of the insured, the claimant and the company.

Any person or organization or the legal representative thereof who has secured such judgment or written agreement shall thereafter be entitled to recover under this policy to the extent of the insurance afforded by this policy. Nothing contained in this policy shall give any person or organization any right to join the company as a co-defendant in any action against the insured to determine the insured's liability.

Bankruptcy or insolvency of the insured or of the insured's estate shall not relieve the company of any of its obligations under coverage B.

11. Other Insurance. If the insured has other insurance against a loss covered by this policy, the company shall not be liable to the insured hereunder for a greater proportion of such loss than the amount which would have been payable under this policy, had no such other insurance existed, bears to the sum of said amount and the amounts which would have been payable under each other policy applicable to such loss, had each such policy been the only policy so applicable.

12. Subrogation. In the event of any payment under this policy, the company shall be subrogated to all rights of recovery therefor of the insured and any person entitled to the benefits of this policy against any person or organization, and the insured shall execute and deliver instruments and papers and do whatever else is necessary to

secure such rights. The insured shall do nothing after loss to prejudice such rights.

13. **Changes.** Notice to any agent or knowledge possessed by any agent or by any other person shall not effect a waiver or a change in any part of this policy or estop the company from asserting any right under the terms of this policy; nor shall the terms of this policy be waived or changed, except by endorsement issued to form a part of this policy.

14. **Assignment.** Assignment of interest under this policy shall not bind the company until its consent is endorsed hereon. If, however, during the policy period the insured shall die, and written notice is given to the company within thirty days after the date of such death, this policy shall cover the insured's legal representative as insured; provided that notice of cancelation addressed to the insured named in the declarations and mailed or delivered, after such death, to the address shown in this policy shall be sufficient notice to effect cancelation of this policy.

15. **Cancelation.** This policy may be canceled by the insured by mailing to the company written notice stating when thereafter the cancelation shall be effective. This policy may be canceled by the company by mailing to the insured at the address shown in this policy written notice stating when not less than ten days thereafter such cancelation shall be effective. The mailing of notice as aforesaid shall be sufficient proof of notice. The effective date and hour of cancelation stated in the notice shall become the end of the policy period. Delivery of such written notice either by the insured or by the company shall be equivalent to mailing.

If the insured cancels, unless the manuals in use by the company otherwise provide, earned premium shall be (1) computed in accordance with the customary short rate table and procedure and (2) not less than the mini-

mum premium stated in the declarations. If the company cancels, earned premium shall be computed pro rata. Premium adjustment may be made at the time cancellation is effected and, if not then made, shall be made as soon as practicable after cancellation becomes effective. The company's check or the check of its representative mailed or delivered as aforesaid shall be a sufficient tender of any refund of premium due to the insured.

When the insurance under the workmen's compensation law may not be canceled except in accordance with such law, this condition so far as it applies to the insurance under this policy with respect to such law, is amended to conform to such law.

16. Terms of Policy Conformed to Statute, Coverage A. Terms of this policy which are in conflict with the provisions of the workmen's compensation law are hereby amended to conform to such law.

17. Declarations. By acceptance of this policy the insured agrees that the statements in the declarations are his agreements and representations, that this policy is issued in reliance upon the truth of such representations and that this policy embodies all agreements existing between himself and the company or any of its agents relating to this insurance.

As respects the company previously designated, the following correlative provision forms a part of this policy:

Mutual Policy Conditions

Lumbermens Mutual Casualty Company

American Manufacturers Mutual Insurance Company

Federal Mutual Insurance Company

This is a perpetual mutual corporation owned by and operated for the benefit of its members. This is a non-

assessable, participating policy under which the Board of Directors in its discretion may determine and pay unabsorbed premium deposit refunds (dividends) to the insured.

As respects the State of Texas, such provision is amended to read as follows:

Mutuals—Membership and Voting Notice. The insured is notified that by virtue of this policy he is a member of the company so designated, and is entitled to vote either in person or by proxy at any and all meetings of said company. The Annual Meetings are held in its Home Office at the place and time stated on the front cover.

Mutuals—Participation Clause Without Contingent Liability. No Contingent Liability: This policy is non-assessable. The policyholder is a member of such company and shall participate, to the extent and upon the conditions fixed and determined by the Board of Directors in accordance with the provisions of law, in the distribution of dividends so fixed and determined.

Dividends.

American Motorists Insurance Company

This policy is participating and shall be entitled to receive unabsorbed premium deposit refunds as apportioned by the directors.

As respects the State of Texas, such provision is amended to read as follows:

Dividend Provision—Participating Companies. The named insured shall be entitled to participate in a distribution of the surplus of the company, as determined by its Board of Directors from time to time, after approval in accordance with the provisions of the Texas Insurance Code, of 1951, as amended.

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/s/ James B

WAIVER OF RIGHT OF SUBROGATION

It is agreed that the company waives any right of subrogation against:

- (a) The United States of America
- (b) The District of Columbia
- (c) The State of Maryland
- (d) The Commonwealth of Virginia
- (e) Bechtel Associates, Bechtel Incorporated, Bechtel Associates Professional Corporation (D.C.), & Bechtel Associates Professional Corporation (Va.)

which might arise by reason of any payment made under this policy.

(This Endorsement cancels and replaces Endorsement No. 2A)

Effective Date: Unless an effective date is stated below, this endorsement shall be effective as of the beginning of the policy period stated in the declaration of the policy.

This endorsement shall form a part of the policy to which it is attached.

STANDARD FIDELITY
CARRIAGE COMPANY

AMERICAN FIDELITY
INSURANCE COMPANY

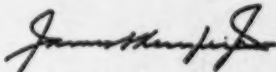
AMERICAN MANUFACTURING
FIDELITY INSURANCE COMPANY

FEDERAL FIDELITY
INSURANCE COMPANY

POLICY NUMBER	ENDORSEMENT EFFECTIVE
ICL 751 451	Month 6 Day 7 Year 73

Endorsement No. 2B

Completion necessary only for policies where issued subsequent to policy preparation.



Workmen's Compensation and Employers' Liability Policy

ALL STATES ENDORSEMENT

A. In the event the insured undertakes operations in any state not designated in Item 3 of the declaration, other than Nevada, North Dakota, Ohio, Washington, West Virginia or Wyoming the company agrees as follows:

1. To reimburse the insured for all compensation and other benefits required of the insured under the workmen's compensation or occupational disease law of such state.
2. Such insurance as is afforded by the policy under coverage 8 also applies to bodily injury by accident or disease, including death at any time resulting therefrom, sustained by any employee of the insured arising out of and in the course of his employment in operations in such state or in operations necessary or incidental thereto.
3. Such insurance as is afforded by the policy by virtue of this endorsement does not apply to such operations if the insured has, under any workmen's compensation or occupational disease law, other insurance for such operations or is a qualified self-insurer therefor, or has affirmatively rejected the workmen's compensation or occupational disease law applicable to such operations.

B. The agreements in paragraph A foregoing are subject to the following conditions:

1. The insured shall give notice to the company before or within a reasonable time after the commencement of such operations, but failure to give such notice shall not invalidate the insurance afforded by this endorsement.
2. The insured shall, if requested by the company, take whatever action is necessary to bring himself within the workmen's compensation and occupational disease laws of such state with respect to such operations. The company shall thereupon issue, in the form required by such laws, and the insured shall accept, workmen's compensation coverage under such laws, and such insurance as is afforded by this endorsement with respect to such operations shall thereupon terminate.
3. The premium basis and rates for the classifications of operations in such state or operations necessary or incidental thereto shall be those which would have been applicable under the manuals in use by the company had coverage A of the policy applied to such operations and the premium for the insurance afforded by this endorsement shall be computed accordingly, subject to the provisions of Condition 1 of the policy.
4. The word "State" as used in this endorsement means any State of the United States of America and the District of Columbia.

C. Such insurance as is afforded by the policy by virtue of this endorsement shall not apply:

1. To injury to or death of the master or a member of the crew of any vessel; or
2. To fines or penalties imposed on the insured for failure to comply with the requirements of any workmen's compensation law.

D. The insurance afforded by the policy by virtue of this endorsement shall not constitute workmen's compensation insurance as required of any employer under the laws of any state.

E. All of the provisions of the policy, except coverage A of Insuring Agreement 1 and Conditions 8 and 14, insofar as such provisions are not inconsistent herewith, are applicable to the insurance afforded by the policy by virtue of this endorsement.

The effective date and hour of this endorsement is stated below and reference to hour shall be Standard Time at the address of the named insured as stated in the policy. This endorsement shall terminate with the policy.

This endorsement is subject to the declarations, conditions, exclusions and other terms of the policy which are not inconsistent herewith, and when countersigned by an authorized representative of the company forms a part of the policy described below.

LUMBERMEN'S MUTUAL CASUALTY COMPANY

Company

ISSUED TO Washington Metropolitan Area Transit Authority				POLICY EFFECTIVE DATE 7 30 71		PRODUCER'S NUMBER 01-667A
POLICY NUMBER ICL 751 451	NAME CODE WMATA	ENDORSEMENT NO. 3	ENDORSEMENT EFFECTIVE DATE 12-01 AM 7	MONTH 30	YEAR 71	DECLARATION OF ASSIGNMENT OF INTEREST
COUNTERSIGNED AT Washington, D. C.			SIGNATURE DATE			

Workmen's Compensation and Employers' Liability Policy

UNITED STATES LONGSHOREMEN'S AND HARBOR WORKERS'
COMPENSATION ACT ENDORSEMENT

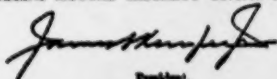
It is agreed that:

1. With respect to operations in a state designated in Item 3 of the declarations, the unqualified term "workmen's compensation law" includes the United States Longshoremen's and Harbor Workers' Compensation Act, U. S. Code (1946) Title 33, Sections 901-49, and Definition (a) of Insuring Agreement III is amended accordingly.
2. With respect to operations subject to the said Longshoremen's and Harbor Workers' Compensation Act, the states, if any, named below, shall be deemed to be designated in Item 3 of the declarations.

ALL STATES NOT DESIGNATED IN ITEM 3 OF THE DECLARATIONS

The effective date and hour of this endorsement is stated below and reference to hour shall be Standard Time at the address of the named insured as stated in the policy. This endorsement shall terminate with the policy.

LUMBERMEN'S MUTUAL CASUALTY COMPANY



President.

ISSUED TO Washington Metropolitan Area Transit Authority		POLICY EFFECTIVE MONTH DAY YEAR 7 30 71		PRODUCER'S NUMBER 02-4674
POLICY NUMBER ICL 751 491	ENDORSEMENT NUMBER 4	ENDORSEMENT EFFECTIVE DATE MONTH DAY YEAR 12:01 A.M. 7 30 71		SIGNATURE OF LICENSED RESIDENT AGENT
COUNTERSIGNED AT Washington, D. C.		COUNTERSIGNATURE DATE MONTH DAY YEAR		

**WASHINGTON METROPOLITAN AREA
TRANSIT AUTHORITY**

**COORDINATED SAFETY PROGRAM
& REPORTING PROCEDURES**

[Attached as Exhibit #2 to the Plaintiff's Motion for
Relief Under Rule 60 (b) (3) filed on October 27, 1982
in *Johnson v. Bechtel Associates Professional Corp.*,
D.C., et al., C.A. No. 81-0963]

**WASHINGTON METROPOLITAN AREA
TRANSIT AUTHORITY**
600 Fifth Street N.W., Washington D.C. 20001
(202) 637-1204

COORDINATED SAFETY PROGRAM

The prevention of accidents in the course of completing the Metro System is of primary importance to everyone connected with WMATA. Accidents cause suffering and hardship to those immediately involved and result in job delay and additional expense to the contractors.

A low accident rate is not the result of pure luck, but is the direct result of a carefully planned safety program conscientiously carried forward by management and supervision. Positive action must be taken to prevent accidents and for that purpose this safety program has been established.

This manual contains the procedures necessary to the implementation of the Coordinated Safety Program for all Metro construction, and will be used by all personnel as prescribed herein. It in no way releases the contractor from the responsibilities and conditions contained in his contract with the Authority.

The Contractor is responsible for the safety and welfare of his employees and for the protection of property and the general public within his scope of work. The Contractor is responsible for compliance with all federal, state, local and WMATA safety regulations which are applicable to his project.

The National Loss Control Service Corporation (NATLSCO), on behalf of WMATA, will be in the field to assist in promoting effective safety attitudes among all contractor personnel.

General Manager

DEFINITIONS

- Washington Metropolitan Area Transit Authority—(WMATA)**
- Contracting Officer (CO)** —Authorized representative of WMATA for administering contracts related to the construction of Metro.
- General Engineering Consultant (GEC)** —Principal engineering consultant to WMATA, coordinating section designers.
- General Construction Consultant (GCC)** —Principal construction consultant to WMATA, managing construction.
- Section Designer (SXD)** —Consulting firm immediately responsible for the design and, in some instances, construction inspection of a specific section of Metro.
- Resident Engineer (RE)** —Authorized representative of the Contracting Officer to supervise administration of a contract. The Resident Engineer is also a representative of the SXD, GEC or GCC as appropriate.
- Metro Insurance Administrators (MIA)** —Authorized representative of WMATA for administering the Coordinated Insurance Program and Coordinated Safety Program.
- National Loss Control Service Corporation (NATLSCO)** —WMATA's representative for all field safety and loss control activities. NATLSCO also services claims under the Coordinated Insurance Program.
- Coordinated Safety Committee (CSC)** —A committee designated by WMATA for the purpose of coordinating the efforts of WMATA safety representatives. It is composed of MIA's Safety Coordinator (Chairman) NATLSCO's Resident Loss Control Service Manager, GCC Safety Superintendent and a representative of WMATA's Office of Construction.
- Insurance Carrier** —Coordinated Insurance Program for compensation and general liability—Lumbermens Mutual Insurance Co. Coordinated Insurance Program for property—American Home (A.I.G.)
- OR
- Insurance carrier(s) retained directly by the contractor (Phase I only).

SAFETY RESPONSIBILITIES

- A. PRIME CONTRACTOR**
- B. CONTRACTOR'S PROJECT MANAGER**
- C. CONTRACTOR'S SAFETY SUPERINTENDENT**
- D. SUBCONTRACTOR'S JOB SUPERINTENDENT**
- E. JOB FOREMEN**
- F. RESIDENT ENGINEERS**
- G. NATIONAL LOSS CONTROL SERVICE CORPORATION**
- H. METRO INSURANCE ADMINISTRATORS**
- I. SAFETY ENGINEER (WMATA)**
- J. BECHTEL PROJECT SAFETY SUPERVISOR**

PRIME CONTRACTOR

The Contractor must take the initiative in accident prevention. His responsibility cannot be delegated to sub-contractors, suppliers or other persons. The Safety Superintendent is appointed to perform safety inspection services under the direction of the Contractor's Project Manager. It is recognized many potential hazards will be promptly corrected by mutually accepted means of informal communication between the Safety Superintendent and the Resident Engineer. However, it must be understood that formal communication concerning accident prevention is to be maintained between the Contractor's Project Manager, Resident Engineer and the WMATA Office of Construction and NATLSCO in order to preclude any misunderstanding.

The Prime Contractor is responsible for all of the requirements for Accident Prevention (Article 1.36—General Provisions) and Safety Requirements Article 215—Special Provisions) contained in his contract with the Authority. Upon compliance with certain of these provisions, the Contractor will:

1. Upon notification of a contract award, submit a letter of management statement of policy signed by an officer of the company in relation the following:
 - A. His company's safety policy based upon compliance with WMATA's Coordinated Safety Program.
 - B. His company's awareness and knowledge of all local, state and federal safety codes applicable to his contracts with WMATA.
2. Submit a resume of the work experience and qualifications of his safety superintendent as required by his contract with WMATA.
 - A. This resume shall be directed to and will be reviewed by the WMATA Coordinated Safety Committee (letter to be mailed to MIA offices).

- B. This individual may be required to appear for a personal interview by the WMATA Coordinated Safety Committee if additional information is needed.
- 3. Maintain an orientation program for new employees which includes a presentation:
 - A. Hazards present in his work assignment and the general area in which he works.
 - B. Personal protective equipment he must use.
 - C. Method of reporting any unsafe conditions the worker may encounter.
- 4. The Contractor shall furnish copies of all warnings and/or citations of safety violations received from any jurisdictional, state or federal agency. Copies shall be sent within 48 hours to the RE, NATLSCO or MIA offices.

CONTRACTOR'S PROJECT MANAGER

- 1. Be responsible for the supervision of the Safety Superintendent in carrying out the duties and responsibilities of his position.
- 2. Plan and execute all work so as to comply with the stated objectives of the Coordinated Safety Program.
- 3. Comply with all of the provisions of the contract dealing with safety and accident prevention requirements.
- 4. Comply with federal, state and local safety codes and regulations.
- 5. Cooperate with NATLSCO safety representatives.
- 6. Authorize necessary immediate action to correct sub-standard safety conditions existent, reported or observed.

7. Review and take necessary immediate action on safety records through directives or personal interviews with superintendents, job foremen or subcontractors' management.
8. Attend safety meetings as required by the Contracting Officer.

CONTRACTOR'S SAFETY SUPERINTENDENT

1. Make daily safety inspections of job sites and take necessary immediate corrective action to eliminate unsafe acts and/or conditions. Record observations on WMATA Form C-21 in compliance with reporting procedures.
2. Review accidents and recommend immediate corrective action.
3. Provide job foremen with appropriate material for use by job foremen in conducting weekly "tool box" safety meetings.
4. Review safety meetings reports submitted by job foremen and take necessary action to see that required weekly safety meetings are held by the job foremen.
5. Periodically attend foremen "tool box" safety meetings and evaluate effectiveness.
6. Assist in the preparation of all accident investigation and reporting procedures.
7. Implement training programs for supervisors and employees as they apply to their specific responsibilities.
8. Encourage programs for recognition of individual employee's safety efforts and their contribution toward improved work methods.
9. Be responsible for the control of and availability of the necessary safety equipment, including employee personal protective equipment.

10. Coordinate his activities with those of NATLSCO's safety representatives and take necessary steps to immediately implement their appropriate recommendations.
11. Coordinate public relations aspects of the Contractor's safety program.
12. Attend safety meetings held by the Authority. The Safety Superintendent should share his experience, questions and problems with other superintendents at these meetings.

SUBCONTRACTOR'S JOB SUPERINTENDENT

1. Plan and execute all work so as to comply with stated objectives of the WMATA Safety Program.
2. Recognize and implement the safety and loss control requirements contained in the General Conditions entitled "Protection Against Accidents" in the subcontractor's construction agreement.
3. Provide and enforce the use at all times of the personal protective equipment required by WMATA, local, state and federal regulations.
4. Complete supervisory investigation report on all accidents (Reference Supervisor's Report Form C-24).
5. Attend supervisory personnel safety meetings scheduled by Prime Contractor's Project Manager.
6. Schedule weekly "tool box" safety meetings to be held by job foremen for all employees.
7. Periodically attend foremen's weekly "tool box" safety meetings to evaluate effectiveness and offer suggestions for improvement.
8. Take immediate action to correct unsafe practices or conditions when discovered.

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- 1) *Job site material flow surveys* to identify and focus on critical material handling accident hazards.
- 2) *Job site traffic flow surveys* to analyse possible hazard producing interactions of personnel and vehicular equipment.
- 3) *Job layout safety surveys* in order to preplan safety strategies so as to minimize hazard producing situations of men, equipment and materials.

F. Discuss problems relating to safety with the Safety Superintendent, Resident Engineer, Prime Contractor's Project Manager.

G. Supply safety posters, accident prevention signs and other literature.

Reports of all on-site inspections will be furnished in duplicate to the Project Manager with copies to RE and MIA. The frequency of these surveys will be determined by the nature of the work in progress, accident trends and unusual conditions which may arise.

3. NATLSCO will also utilize, on an as-needed basis, their Industrial Hygiene Staff of their Environmental Sciences Service Division to evaluate any potentially serious occupational disease exposures that may exist on job sites in the various projects. The results of such surveys will be made in report form by the Industrial Hygienist. Copies of this report shall be made available to the RE, WMATA Office of Construction, and MIA office.
4. Occupational Health Consultants will be made available to convey periodic evaluations of the first aid and medical facilities provided at various major job sites. They will also provide assistance to any on-site nursing personnel on these projects.

METRO INSURANCE ADMINISTRATORS

Metro Insurance Administrators, as an authorized representative of WMATA, will coordinate the WMATA Safety Program. MIA will:

1. Develop the WMATA Safety Program & Reporting Procedures Manual, constantly monitor the WMATA Safety Program and institute procedural changes as required.
2. Prepare for WMATA a monthly statistical report of accidents and injuries incurred on all Metro construction projects.
3. Conduct weekly safety meetings of the Coordinated Safety Committee. The Committee will consist of safety representatives of GCC, NATLSCO, WMATA and MIA, chairman. Report findings of Committee to WMATA.
4. Be co-chairman with a representative of WMATA Design and Construction in conducting meetings with prime contractors, safety superintendents and/or resident engineers and WMATA construction engineers.
5. Bring to the attention of WMATA those safety problems which cannot be resolved at a lower level.
6. Coordinate and direct the efforts of the NATLSCO Loss Control Program.
7. Coordinate the property loss control efforts of representatives of the American Home (A.I.G.).
8. Coordinate the WMATA preconstruction survey activities (Prime contractors may contact their RE for review of surveys).
9. Meet with local, state and/or federal safety officials in order to keep better informed on safety regulations.

SAFETY ENGINEER (WMATA)

1. Monitor and evaluate the effectiveness of the Bechtel Resident Engineers in enforcing the provisions of the Coordinated Safety Program and provide assistance where needed.
2. Evaluate and direct the activities of the Bechtel Safety Dept.
3. Participate as a member of the Contractor Evaluation Board.
4. Serve as the Authority's representative on the Coordinated Safety Committee.
5. Serve as co-chairman of the monthly safety meeting for Safety Superintendents and Resident Engineers.
6. Serve as chairman of the WMATA Ad Hoc Committee to investigate serious liability and/or compensation accidents and report findings to the Chief of Design and Construction.
7. Meet with contractor and union representatives regarding matters of safety and serve as member of the Safety Advisory Committee.
8. Act as liaison between WMATA, federal and municipal authorities on matters relating to construction safety.
9. Work with WMATA rail operations to develop and coordinate safe work procedures where rail and construction operations are integrated.
10. Assist the Office of Design and Construction with all matters of construction safety.
11. Serve as WMATA's representative at Insurance and Safety meetings.
12. Provide special assistance to contractors with unusual or complicated safety problems.

13. Assist with the writing of contract specifications on matters relating to safety.
14. Assist Community Services in public relations work regarding safety.

BECHTEL PROJECT SAFETY SUPERVISOR

The Bechtel Project Safety Supervisor, as an authorized representative of WMATA, will:

1. Provide safety services to the Bechtel Construction Manager and the Resident Engineers to ensure compliance with the provisions of the WMATA Coordinated Safety Program and Reporting Procedures, applicable safety codes and the contractual obligations of the Authority's contractors.
2. Direct the contractors, through the Resident Engineers, to correct any unsafe condition(s) observed and/or brought to the attention of the project safety supervisor.
3. In the event of non-compliance by a contractor to correct unsafe condition(s), recommend to the Resident Engineer that the work be stopped until condition(s) is corrected.
4. Provide safety services that are coordinated with the Authority's safety representatives and the insurance consultants to develop and maintain a uniform system of safety procedures and reporting requirements which will be applicable to all construction contracts.

GENERAL SAFETY REQUIREMENTS

LOCAL LAWS AND REGULATIONS

The Contractor shall comply with all local, state and federal laws, rules, statutes and regulations of governing or regulatory bodies within the geographical scope of his area of operations.

WMATA REQUIREMENTS

In addition to compliance with all applicable local, state and federal rules and regulations, the Contractor will be required to comply with special WMATA safety requirements as contained in this manual. In all cases, safety laws, regulations, requirements and safety standards shown as an appendix in this section shall be considered minimum standards of compliance.

EMERGENCY PROCEDURES GUIDELINES

The Prime Contractor will set up emergency procedures for the following categories:

- A. Fire
- B. Injury to employee
- C. Injury to general public resulting from a possible slip, fall or vehicular injury
- D. Property damage, particularly to utilities; i.e., gas, water, sewage, electrical, telephone or pedestrian and vehicle routes
- E. Public demonstrations
- F. Bomb threats
- G. Other exposures at Contractor's job site

Emergencies must be handled by the ranking man present, with whoever is available to help.

Actions to be taken during emergencies should be discussed regularly with Contractor's supervisory personnel and at "tool box" safety meetings.

Wherever practical, teams should be established to handle the various types of emergencies.

At least two men qualified in first aid should be working on each shift. The Safety Superintendent should contact his NATLSCO representative if additional training is needed to meet this objective.

When an emergency develops the personnel in charge should:

1. Secure the area tightly and quickly.
2. Give information regarding the situation only to authorized representatives of WMATA or the government. Questions from the media should be referred to WMATA Office of Community Services for reply (See Public Relations under Contacts section of this manual).

In order that necessary emergency services are supplied promptly each contractor should:

1. Post, in a conspicuous place, list of emergency phone numbers, along with the type of information to be transmitted for each emergency situation.
2. Delegate responsibility for making emergency calls. The ranking man present should generally be responsible for this duty.

The Contractor's Emergency Procedures should be reviewed regularly and, where necessary, adjusted to provide maximum effectiveness. All such procedures should be approved by and coordinated with the Resident Engineer.

On occasion a serious accident emergency situation may occur which should be reported without delay to a representative of the Authority. Each case is a matter of judgement by the Resident Engineer, or in his absence, by the Job Superintendent. For reporting critical situations the following telephone number should be used at all times, including nights, weekends and holidays.

SAFETY GUIDELINES—METRO TOURS

It is of the utmost importance that a high degree of protection be afforded all persons touring Metro construction sites. The following guidelines have been prepared as general instructions for those personnel who are responsible for the organization, direction and safe conduct of these tours.

GENERAL REQUIREMENTS

Except for certain technical inspection tours made by WMATA Staff members and their guests the following procedures shall be implemented:

1. All group tours will be cleared through the WMATA Office of Community Services, allowing maximum advance notice.
2. Community Services will contact the Resident Engineer at the sites to be visited to coordinate the tour plan and to assure that necessary safety precautions are taken.
3. Community Services will coordinate the following items with the person requesting the tour:
 - A. Number of Visitors—Individual tour groups in non-hazardous areas should be limited to no more than 20 persons per tour guide; i.e. group of 40 will require at least two guides.
 - B. Clothing—Women will be requested to wear slacks and low-heeled shoes.
 - C. Children—Children under age 12 will not be permitted to accompany tours. Each child age 12-15 must be accompanied by an adult.
 - D. Protective Equipment—Hard hats, boots, raincoats, ear plugs, etc. will be supplied as required.

E. Release and Hold Harmless Agreement—
Each visitor will be required to execute this form prior to the inception of the tour.

4. Immediately prior to entering a job site, all visitors should be briefed about the need for careful and orderly conduct, including mention of any special hazards they may encounter.
5. Large groups should be accompanied at all times by a member of the Resident Engineer's staff while on the job site.

TECHNICAL INSPECTION TOURS

WMATA staff members, who are escorting technical and/or other official visitors in often more hazardous work areas, will comply with the safety precautions noted above. It is recommended that the number of people on such tours be proportionate to the degree of hazard involved.

AD HOC COMMITTEE

At the discretion of the Contracting Officer, an ad hoc committee may be appointed to evaluate all available reports and information obtained from investigative sources on any accidents resulting in a loss of life or injury to 5 or more persons. The ad hoc committee shall submit a written report to the Contracting Officer.

PROTECTION OF THE PUBLIC

The Contractor shall take all necessary precautions to prevent injury to the public or damage to property of others. For the purposes of this manual, the public shall include all persons not employed by the Contractor or a subcontractor working under his direction. Precautions to be taken shall include but not be limited to the following:

1. Work shall not be performed in any area occupied by the public unless specifically permitted by the contract or in writing by the Contracting Officer.
2. When it is necessary to maintain public use of work areas involving sidewalks, entrances to buildings, lobbies, corridors, aisles, stairways and vehicular roadways, the Contractor shall protect the public with appropriate guardrails, barricades, temporary fences, overhead protection, temporary partitions, shields and adequate visibility. Such protection shall guard against harmful radioactive rays or particles, flying materials, falling or moving materials and equipment, hot or poisonous materials, explosives and explosive atmospheres, flammable or toxic liquids and gases, open flames, energized electric circuits or other harmful exposures.
3. Sidewalks, entrances to buildings, lobbies, corridors, aisles, doors or exits shall be kept clear of obstructions to permit safe ingress and egress of the public at all times.
4. Appropriate warnings, signs and instructional safety signs shall be conspicuously posted where necessary. In addition, a signalman shall control the moving of motorized equipment in areas where the public might be endangered.
5. Sidewalk sheds, canopies, catch platforms and appropriate fences shall be provided when it is necessary to maintain public pedestrian traffic adjacent to the erection, demolition or structural alteration of outside walls on any structure. The protection required shall be in accordance with the laws and regulations of the District of Columbia or other political subdivision involved.

6. A temporary fence shall be provided around the perimeter of above-ground operations adjacent to public areas except where a sidewalk, shed or fence is provided by the contract or as required by subparagraph 5 above. Perimeter fences shall be at least six (6) feet high. They may be constructed of wood or metal frame and sheathing, wire mesh or a combination of both as provided in contract specification. When the fence is adjacent to a sidewalk near a street intersection at least the upper section of fence shall be open wire mesh from a point not over four (4) feet above the sidewalk and extending at twenty-five (25) feet in both directions from the corner of the fence or as otherwise required by local jurisdiction involved.
7. Guardrails shall be provided on both sides of vehicular and pedestrian bridges, ramps, runways and platforms. Pedestrian walkways elevated above adjoining surfaces, or walkways within six (6) feet of the top of excavated slopes or vertical banks shall be protected with guardrails, except where sidewalk sheds or fences are provided as required by subparagraph 5 above. Guardrails shall be made of rigid materials capable of withstanding a force of at least two hundred (200) pounds applied in any direction at any point in their structure. Their height shall be approximately (42) inches. Top rails and posts may be two (2) inches by four (4) inches dressed wood or equal. Intermediate horizontal rails at mid-height and toe boards at platform level may be one (1) inch by six (6) inch wood or equal. Posts shall not be over eight (8) feet apart.
8. Barricades meeting the requirements of the political subdivision involved shall be provided

where sidewalk shed, fences or guardrails as referenced above are not required between work areas and pedestrian walkways, roadways or occupied buildings. Barricades shall be secured against accidental displacement and shall be maintained in place except where temporary removal is necessary to perform the work. During the period a barricade is removed temporarily for the purpose of work, a watchman shall be placed at all openings.

9. Temporary sidewalks shall be provided when a permanent sidewalk is obstructed by the Contractor's operations. They shall be in accordance with the requirements of the political subdivision involved. Guardrails shall be provided on both sides of temporary sidewalks.
10. Warning signs and lights, including lanterns, torches, flares and electric lights, meeting requirements of the political subdivision involved, shall be maintained from dusk to sunrise along guardrails, barricades, temporary sidewalks and at every obstruction to the public. They shall be placed at both ends of such protection or obstructions and not over twenty (20) feet apart alongside of such protection or obstructions.
11. Fuel-burning types of lanterns, torches, flares or other open flame devices are prohibited within twenty (20) feet of open utility man-holes.

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E. NATLSCO's loss control consultants on subsequent visits will verify compliance with previously submitted recommendations. If compliance has not been obtained, they shall meet with the RE, Contractor's Safety Superintendent and Project Manager and develop a solution to the problem. If, in the event compliance cannot be obtained, immediate notification shall be given to MIA, Bechtel's Safety Supervisor and WMATA's Construction Safety Engineer.

5. *Bechtel Safety Representatives*

This form shall be used by Bechtel's safety representatives performing safety inspection services on all projects. The Bechtel representatives shall prepare this form, noting all unsafe acts or conditions observed during their field inspection.

The Bechtel representatives shall discuss their findings with the Contractor and RE. Copies of their recommendations shall be left with the Contractor and the RE with abatement dates established.

The Contractor shall fill in "Action Taken" column and return a copy of the report to the RE's office for transmittal to the Bechtel Safety Supervisor. The RE shall follow up on action taken by the contractor and verify compliance by so noting in "Action Taken" column of the report. He shall then transmit a copy of his report to the Bechtel Safety Supervisor.

The Bechtel Safety Supervisor shall be responsible for supplying copies of all of these reports to MIA, NATLSCO and the WMATA Construction Safety Engineer.

REPORT OF ACCIDENT OR DAMAGE TO EQUIPMENT OR PROPERTY

1. This form shall be prepared covering each and every accident to equipment or property.
2. The form shall be prepared from information as a result of investigation or direct reports of the person or persons involved or responsible.
3. Report shall be furnished promptly.
4. This form shall be prepared by the contractor, who shall retain the original and submit copies to the RE, NATLSCO and MIA offices.
5. All accidents involving damage to property, including raw materials or equipment; installed equipment; motor vehicles and heavy construction equipment are reportable.
6. Investigation of alleged damage to private property:
 - A. All buildings along the route of the Metro System that may be affected by construction will have been inspected by the Contractor and a report submitted to the Contracting Officer, MIA and NATLSCO prior to the commencement of any construction work.
 - B. If, in the course of construction work, property damage occurs which is allegedly due to construction operations, this reporting procedure is to be followed.
 - C. If, however, a property owner reports damage to his property, of which his complaint is the first intimation, and alleges that it is due to construction, he will probably request prompt inspection.
 - D. If the property owner makes his complaint and request to the RE, the RE will then report the complaint on Form C-23.

- E. In complying with an owner's request for report of damage allegedly due to construction work, particular care is required to see and record only the fact, *and to avoid expressing opinion*. The owner's opinion shall be recorded as "remarks by owner".

INSTRUCTIONS FOR IMPLEMENTATION OF THE WMATA CONSTRUCTION SAFETY INCENTIVE AWARD PROGRAM

All construction contractors will participate in the program and shall keep accurate records of employee hour exposure and accidents and submit reports to the MIA office in accordance with reporting procedures.

Awards shall be based on statistics reported on WMATA Form C-26—Washington Metropolitan Area Transit Authority Accident Experience Summary.

Awards shall be made in each group as follows:

Group A—Less than 100,000 employee hours

Any Contractor in Group A who completes a project with more than 2,500 employee hours but less than 100,000 employee hours without a lost time injury shall receive a letter of commendation signed by the Contracting Officer.

Group B—More than 100,000 employee hours

Any Contractor who accumulates the following employee hours of work without a lost time injury shall receive awards as indicated below:

100,000—Letter of Commendation

250,000—Certificate of Merit

500,000—Certificate of Excellence

750,000—Superior Award Certificate

1,000,000—Metro System Safety Trophy and Certificate of Honor

Letters of commendation, certificates and trophies shall indicate the Contractor's name, project name, project lo-

cation, type of work, number of manhours worked without a lost time accident, and the period of time covered by the award.

MIA will notify the Contracting Officer when a contractor becomes eligible for an award.

FEDERAL (OSHA) REGULATIONS

Each contractor shall be familiar with the Federal Occupational Safety and Health Act (OSHA) as it pertains to his work responsibility, and will implement it as federal law requires.

All fatality cases and/or accidents in which five (5) or more persons are injured in any one accident shall be reported to the Area Director and/or Regional office within 48 hours from the time of the occurrence.

Regional Administrator
U.S. Dept. of Labor
15220 Gateway Center
3535 Market Street
Philadelphia, Pennsylvania 19104

*Region III—Delaware,
D.C., Maryland, Penna.,
Virginia, W. Virginia*

Phone: 215 596-1201

U.S. Dept. of Labor
1110 A Federal Building
Charles Center
31 Hopkins Plaza
Baltimore, Maryland 21201

Baltimore Area Office

Phone: 301 962-2840

U.S. Dept. of Labor
O.S.H.A.
Railway Labor Building
400 First Street, N.W.
Washington, D.C. 20210

D.C. Area Office

Phone: 202 961-5132

U.S. Dept. of Labor
O.S.H.A.
Federal Building
P.O. Box 10186
Richmond, Virginia 23240

Virginia Area Office

Phone: 804 782-2864

Copies of the Occupational Safety and Health Act of 1970 and related information on state plans, standards, education and training programs may be secured from the offices listed above or:

U.S. Department of Labor
Occupational Safety and
Health Administration
200 Constitution Avenue, N.W.
Washington, D.C. 20210

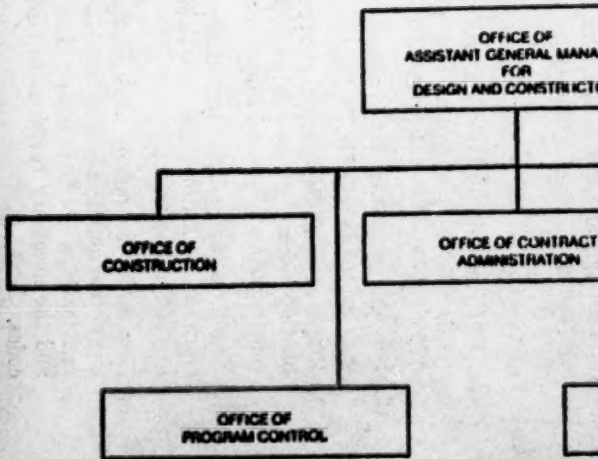
Phone: 202 528-8165

**DEPARTMENT OF
DESIGN AND CONSTRUCTION**

[Attached as Exhibit B to WMATA's Opposition
to the Plaintiff's 60(b)(3) Motion for
Relief filed on November 9, 1982 in
*Johnson v. Bechtel Associates
Professional Corp., D.C.,
et al., C.A. No. 81-0963*]



Department of Design and Construction



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OFFICE OF ENGINEERING
AND ARCHITECTURE

OFFICE OF
REAL ESTATE

Primary Responsibility

The Assistant General Manager for Design and Construction is responsible for supervising all aspects of the design and construction of the Metrorail system and major Metrobus facilities and equipment. Also, is accountable to the Board of Directors and the General Manager for the actions of the Offices of Engineering, Equipment Design, Architecture, Construction, Contract Administration, Program Control and Real Estate. The Assistant General Manager is the contracting officer for supplies, equipment, construction, and architectural and engineering services, real estate agreements including deeds and execution of declarations of taking, and services administered by the Department of Design and Construction.

As an Officer of the Authority, the Assistant General Manager for Design and Construction reports directly to the General Manager.

Broad Functions

1. Establishes design criteria, standard specifications, general plans, standard plans, and construction management procedures.
2. Selects, negotiates, and awards architectural-engineering contracts.
3. Prepares final design plans, specifications and bidding documents and advertises and awards construction and related supply contracts.
4. Negotiates and administers utility contracts and work authorizations for new construction, relocation, and services.
5. Negotiates and administers master agreements with other public agencies covering the working relationships during design and construction and the necessary revisions to building and fire codes.

6. Furnishes engineering and technical services to Authority staff for the establishment of route locations, sites for stations and other facilities, operation schedules and furnishes drafting services as required.
7. Negotiates and administers contracts for environmental impact studies.
8. Administers the appraisal, acquisition, management, demolition, and disposal of real property interests, and the relocation of displaced occupants from acquired properties and payment of claims in connection therewith.
9. Attends such conferences with outside planning groups as may be required.
10. Prepares and maintains cost control estimates, schedules, and forecasts; assists in the preparation of the annual rail construction budget.
11. Furnishes administrative services to process design and construction contracts, contract modifications, payments, progress reports, and control procedures.
12. Manages and controls performance of transit car and related equipment design and project management services performed by consultants.

Primary Responsibility

The Office of Construction (CONS) assures that Metro-rail and Metrobus construction projects are delivered on-time, within budget and established safety goals, and that the resulting facilities reflect high standards of quality and serviceability. To accomplish this primary responsibility, the Office of Construction intensively manages the construction and construction-related contracts and agreements which the Assistant General Manager for Design and Construction (DECO) and the Director of Construction, as Contracting Officers, enter into. Specifically, the Office provides over-all management of those contracts, to include field supervision and support services for them and places special emphasis on assuring that contractors comply with the terms of their contracts.

The Director reports to the Assistant General Manager for Design and Construction.

Detailed Functions

1. Provides all aspects of construction management and field supervision of construction contractors including testing, transfer of completed facilities to the Department of Transit Operations or others, and closeout of contracts. Management and supervision are accomplished through Authority employees directly or through the General Construction Consultant (GCC) or other construction management consultants retained on ad hoc bases as special needs arise. In performing field supervision, emphasizes that the technical terms of the contract are to be met, that the contractor is to maintain schedule, and that the work is to be performed safely.
2. Supervises the GCC's and special construction consultants' performances. With support from the Office of Contract Administration (CONT), negotiates the annual GCC contract and participates in its administration.

3. Provides staff support to the Director in his capacity as Contracting Officer for all construction and construction-related contracts except those for which the Assistant General Manager for Design and Construction is specifically appointed Contracting Officer.
4. Develops and publishes policy and procedures for construction management, administration, and contract closeouts; provides close, direct liaison with the Urban Mass Transportation Administration (UMTA) on these matters; alerts UMTA to pending formal requests relative to contract modifications exceeding WMATA's approval authority.
5. Initiates, systematically records, and monitors construction contract Pending Change Orders. Negotiates and processes construction contract modifications and claims settlements for amounts greater than the approval authority delegated to the Resident Engineer.
6. Assists the Contracting Officers in making contractual determinations and decisions relative to negotiations and closeout settlements on those completed contracts which, due to claims, disputes and appeals, have not been financially closed out; furnishes UMTA with required documentation on completed contracts.
7. Administers, under the special direction of the Assistant General Manager for Design and Construction and with the assistance of other offices of the Department of Design and Construction and in coordination with the Offices of Bus Services (BUSV), Rail Services (RAIL), and General Maintenance (GMNT), a comprehensive, special construction program-management system for both Metrobus and Metrorail facilities, to include: (a) maintaining a priority listing of Metrobus and Metrorail special construction and facilities rehabilitation projects

well coordinated, mutual efforts between and among the affected Authority elements, the Resident Engineers, and the various contractors. A fuller discussion of meeting attendance, agenda, actions/decisions, and follow-up activities follows:

- (1) Attendance—In addition to representatives from the affected Authority elements and contractors, the affected structural, finish, and systemwide Resident Engineers and Area Managers attend.
 - (2) Agenda—Review progress of work, by contract, on the Phase; identify existing and potential problems (e.g., delays, design changes, and interferences between and among contractors).
 - (3) Actions/Decisions—Develop recommended actions; make necessary decisions; give appropriate on-the-spot directions needed to maintain the Phase schedule.
 - (4) Follow-up Activities—Identify the essential items to be specifically checked on during the routine, daily coordination contracts between and among the affected Resident Engineers and Area Managers; identify the essential items requiring ENGA, GMNI, Systems Maintenance, and consultant (e.g., General Architectural Consultant (GAC), General Engineering Consultant (GEC)) interface/input and which are to be specifically followed-up on prior to the next meeting, thus assuring proper coordination of all activities.
- b. Initiating, thru the responsible Resident Engineer, contractor actions to correct deficiencies and/or make changes, as necessary, to assure that operational and contract requirements are met.

- c. Scheduling and coordinating pre-energization activities in support of the Start-up Manager.
 - d. Participating with Start-up, Automatic Train Control (ATC) and Communications (COMM) Contractors, and the Resident Engineers, in scheduling dynamic testing activities; concurrently scheduling contractors' access into the start-up area to complete their work and correct deficiencies; keeping Start-up and Systems Maintenance informed of the various requirements and the most efficient schedule for meeting them.
 - e. Coordinating final acceptance by and turnover to the Department of Transit Operations of all facilities in the operational phase (requires advance contact, close coordination and direct working relationship with the responsible personnel from the accepting office(s)).
 - f. Preparing "after-action" reports and distributing to all concerned so that hard-earned experiences can be used to best effect in succeeding Phases.
13. Provides the Chairman of the Project Change Order (PCO) Review Committee, a committee established at the specific direction of the AGM/DECO to review all proposed design-change PCO's, rule on the adequacy of their justification prior to initiation of detailed design work, monitoring the status of the PCO's through the time of actual issuance to the contractor; and initiating necessary corrective actions, as appropriate. The Chairman is vested with authority to approve or disapprove proposed design-change PCO's at any stage of the review process or to issue additional guidance, as appropriate.
 14. Provides voting-member representation on design and construction Contractor Evaluation Boards.
 15. Performs the following functions to maintain a finger on the pulse of the construction industry, serve

the WMATA-compact jurisdictions, and serve the Authority's operating elements:

- a. Conducts technical reviews of information on new construction techniques that could lead to improved techniques and methods, performance, and materials on the Authority's construction projects.
- b. Conducts pre-bid conferences, Annual Construction Contractor Conferences, and periodic incentive-type evaluations of the GCC, Resident Engineer and other field offices.
- c. Furnishes appropriate Authority representation at conferences and meetings on construction problems and policies.
- d. Maintains liaison with contractor associations, labor unions and job-training organizations.
- e. Maintains necessary liaison with appropriate officials of the local jurisdictions which are participants in the WMATA Compact. Serves as point-of-contact with the general public and the business community relative to requests for construction information and other technical assistance.
- f. Consults and coordinates with other Authority elements, as appropriate, on matters pertaining to construction and startup of Metrorail and Metrobus facilities.

. . . .

Primary Responsibility

The Office of Contract Administration is responsible for coordinating the procurement of material, equipment, engineering and construction services required for the Department of Design and Construction and Transit Operations, and for providing complete contract administration services throughout the life of each contract including the resolution of contract problems and disputes. In this regard, the Office is responsible for assuring compliance with the terms of each contract for architectural and engineering design, consulting services, materials and equipment; for coordinating the actions of other Authority offices concerned with such contracts and for providing liaison with contractors and prospective contractors.

The Director reports to the Assistant General Manager for Design and Construction as a member of the Department of Design and Construction.

Detailed Functions

1. Provides contract support to other Authority offices in the negotiation of contracts for engineering, consultant, construction, equipment and transit services and modifications thereto.
2. Provides contract administration services to the Offices of Engineering, Construction, Equipment Design, Transit Operations and other offices in their administration of contracts.
3. Reviews and approves to the Assistant General Manager for Design and Construction, contractor requests for purchase of equipment, supplies and services under all cost-plus-fixed-fee contracts.
4. Evaluates contract disputes involving contract interpretation, suspension or acceleration of work, changed conditions and time extensions.

Makes determinations as to merit on allegations of differing site conditions.

5. Negotiates the settlement of unresolved contract disputes as directed by the Assistant General Manager for Design and Construction.
6. Prepares Findings of Fact and Final Decisions for the Assistant General Manager for Design and Construction in unresolved contract disputes.
7. Interprets and evaluates audit report findings and utilizes same in contract settlements; checks their conformity with cost and pricing data submittals.
8. Participates in the development and formulation of new contracting policies and procedures.
9. Reviews and approves all contract actions processed within various Authority offices.
10. Receives and evaluates bid and pre-award information and assists in the opening of all bids and proposals submitted to the Authority for the Department of Design and Construction, and Transit Operations.
11. Coordinates with the Office of the General Counsel allegations of mistakes, bidding errors, or other procurement discrepancies.
12. Coordinates the payment of contractors' invoices on all cost reimbursable contracts and fixed price contracts.
13. Coordinates contract close-out, suspension and termination actions.
14. Provides guidance regarding contractual matters to Authority and consultant personnel designated as authorized representatives of the Assistant General Manager for Design and Construction contracting office. Assists the Office of Construc-

tion and the General Construction Consultant in the resolution of contract disputes involving the interpretation of the terms of construction contracts.

15. Establishes and maintains the Authority's official contract files for all design construction, equipment and consultant contracts, and final decisions of the Assistant General Manager for Design and Construction.
16. Reviews the submittal of contract actions to the Urban Mass Transportation Administration (UMTA) for compliance with designated procedures.

Primary Responsibility

The Office of Engineering & Architecture has the responsibility for the overall design of Metrorail system and Metrobus system facilities, transit buses and rail transit vehicles. This office's primary objective is to provide contract documents (plans, specifications, bidding documents, etc.) for the construction and equipping of a complete and functional rail rapid transit system and for new, rehabilitated or expanded Metrobus facilities. ENGA is responsible for development and updating of all design standards and parameters of the entire Metro system, for the review and approval of designs for construction adjacent to Metro facilities and for the engineering and architectural support to other Authority departments and offices.

The Director reports to the Assistant General Manager for Design and Construction as a member of the Department of Design and Construction.

Detailed Functions

1. Implements directives and policies of the Board of Directors, the General Manager and the Assistant General Manager for Design and Construction.
2. Assists the Assistant General Manager for Design and Construction by monitoring and reviewing the activities of the general engineering, architectural, soils systems, vehicle and other consultants who perform design services for the Authority.
3. Controls performances, reviews and recommends approval of the final design services, including payment invoices and work products developed by consulting architectural and engineering firms under contract to the Authority and monitored by the Office of ENGA.

4. Prepares master agreements with public and private agencies, and utilities, and supplements thereto.
5. Prepares and coordinates, with the appropriate agencies, revisions to building and fire codes required to accommodate the transit system.
6. Prepares and coordinates the preparation of design criteria and updates standard specifications for use throughout the rapid transit system.
7. Provides engineering and architectural support to the Office of Planning and Development in the development of the Metrorail system including feasible station, route and system layouts including development of typical types of construction that could be employed in that layout with consideration to topographic and man-made features that exercise control over the alignment and station location, and to the social and economic consideration.
8. Develops environmental studies and presentations in support of new or expanded facilities.
9. Monitors development of design and procurement of automatic train control (ATC) and communications (COMM) systems; prepares specifications for peripheral subsystems and equipment such as bus radios and major modifications to original designs.
10. Evaluates on-going procurement of automatic train control and communications systems and equipment for compatibility to existing facilities; analyzes new techniques and equipment for cost and operational improvements; checks maintenance and servicing experience to determine whether operating design objectives established in original procurements have been accomplished and whether new analyses are required.

11. Determines the necessity for relocation of utilities and conducts negotiations with utility owners or managers to develop suitable plan for the relocation.
12. Develops basic design for special facilities.
13. Identifies and certifies to the Office of Real Estate the minimal real property interests required for construction, operation and maintenance of Metrorail and Metrobus facilities.
14. Performs drafting, charting and blueprinting services for the Authority.
15. Performs field inspections as necessary to assure that construction is being performed in accordance with design and to obtain information leading to improvement in the design of future works.
16. Participates in construction surveillance to include review of suggested field changes or modifications to the approved design.
17. Provides engineering services in support of other activities of the Authority such as studies of existing or proposed facilities as requested by affected department or office; investigates failures and recommends corrective actions; assists in the development of safety and fire protection standards; reviews and approves designs for construction (by others) adjacent to Metro facilities; processes permits for use of Authority right-of-way by others.
18. Coordinates, together with other Authority officers, all architectural and visual design work with outside agencies (such as the National Capital Planning Commission, The Commission of Fine Arts, the National Park Service) and citizens representatives of local communities.

19. Directs the General Architectural Consultant in a program of visual displays as required by design development and community coordination, the displays consisting of perspective renderings and scale models of varying complexity.
20. Coordinates and assists in the study of, and solution to, safety, space use, and graphics requirements encountered in the transit system.
21. Responsible for the monitoring of planting procurement and landscape installation contracts for which the General Architectural Consultant is section designer and construction supervisor.
22. Responsible for review, comment, and determination of layout for all signage and graphics requirements for the rapid transit system.
23. Develops and prepares design plans and specifications for procurement of buses, automatic fare collection equipment, parking lot equipment, and revenue processing equipment.
24. Evaluates on-going procurement of systems and equipment for compatibility to existing facilities, analyzes new techniques and equipment for cost and operational improvements, checks maintenance and servicing experience to determine whether new analyses are required.
25. Provides inputs to other offices on schedule requirements for systems and equipment procurements.
26. Maintains an effective liaison with other offices, other transit properties and governmental agencies (as appropriate) in order to remain abreast of the state-of-the-art of rail transit and bus technology, and system assurance and safety programs.

Primary Responsibility

The Office of Program Control is responsible for Metro-rail and Metrobus Capital Construction System Program-ming to include: monitoring all funds allocated to the various real estate, design, construction and supporting functions; scheduling of planning, design, construction and pre-operations activities; and for developing integrated total future system function costs within available funds.

The Director reports to the Assistant General Manager for Design and Construction as a member of the Department of Design and Construction.

Detailed Functions

1. Monitors and advises management on the status of Metrorail and Metrobus capital construction program fund sources utilizing the Project Management System and accounting records for status of obligations and expenditures.
2. In consultation with the appropriate design and construction offices and the general consultants, maintains the system program schedules to include the detailed design and construction schedule. Administers, supervises and advises on the project management of design and construction contracts, including determining by computer the contractors' progress toward meeting the program schedule.
3. Prepares the Metrorail and Metrobus capital construction program for the Authority within parameters established by the Board of Directors to include integrating into a coherent program past history as recorded by accounting with future forecasts of inflation, obligations, expenditures, funds available and schedules.

[SEAL]

WASHINGTON
METROPOLITAN
AREA TRANSIT
AUTHORITY

GENERAL
PROVISIONS
AND
STANDARD
SPECIFICATIONS
FOR CONSTRUCTION
PROJECTS

1978

[Attached as Exhibit C to WMATA's Opposition to the
Plaintiff's 60(b)(3) Motion for Relief filed on
November 9, 1982 in *Johnson v. Bechtel
Associates Professional Corp., D.C.,
et al.*, No. 81-0963]

[SEAL]

**WASHINGTON METROPOLITAN AREA
TRANSIT AUTHORITY****general provisions and standard specifications
for construction projects****TABLE OF CONTENTS**

Division No.	Title
G.P.	GENERAL PROVISIONS
1	GENERAL REQUIREMENTS
2	SITE WORK
3	CONCRETE
4	MASONRY
5	METALS
6	WOOD AND PLASTICS
7	THERMAL AND MOISTURE PROTECTION
8	DOORS AND WINDOWS
9	FINISHES
10	SPECIALTIES
11	EQUIPMENT (this division not used)
12	FURNISHINGS (this division not used)
13	SPECIAL CONSTRUCTION
14	CONVEYING SYSTEMS (this division not used)
15	MECHANICAL
16	ELECTRICAL

GENERAL PROVISIONS

TABLE OF CONTENTS

Article	Title	Page
1	DEFINITIONS	
2	SPECIFICATIONS AND DRAWINGS	
3	CHANGES	
4	DIFFERING SITE CONDITIONS	
5	TERMINATION FOR DEFAULT-DAMAGES FOR DELAY TIME EXTENSIONS	
6	DISPUTES	
7	PAYMENTS TO CONTRACTOR	
8	ASSIGNMENT OF CLAIMS	
9	MATERIAL AND WORKMANSHIP	
10	INSPECTION AND ACCEPTANCE	
11	SUPERINTENDENCE BY CONTRACTOR.....	
12	PERMITS AND RESPONSIBILITIES	
13	CONDITIONS AFFECTING THE WORK	
14	OTHER CONTRACTS	
15	PATENT INDEMNITY	
16	ADDITIONAL BOND SECURITY	
17	COVENANT AGAINST CONTINGENT FEES..	
18	OFFICIALS NOT TO BENEFIT	
19	CONVICT LABOR	
20	EQUAL OPPORTUNITY	
21	UTILIZATION OF SMALL BUSINESS CON- CERNS	
22	SUSPENSION OF WORK	
23	DAVIS-BACON ACT	
24	CONTRACT WORK HOURS AND SAFETY STANDARDS ACT—OVERTIME COMPEN- SATION	
25	APPRENTICES AND TRAINEES	
26	PAYROLLS AND BASIC RECORDS	
27	COMPLIANCE WITH COPELAND REGULA- TIONS	
28	WITHHOLDING OF FUNDS	
29	SUBCONTRACTS	
30	CONTRACT TERMINATION—DEBARMENT..	
31	GRATUITIES	

Article	Title	Page
32	FEDERAL, STATE AND LOCAL TAXES.....	
33	TERMINATION FOR CONVENIENCE OF THE AUTHORITY	
34	NOTICE AND ASSISTANCE REGARDING PATENT AND COPYRIGHT INFRINGE- MENT	
35	COMPOSITION OF CONTRACTOR	
36	SITE INVESTIGATION	
37	PROTECTION OF EXISTING VEGETATION, STRUCTURES, UTILITIES AND IMPROVE- MENTS	
38	OPERATIONS AND STORAGE AREAS	
39	CONTRACT MODIFICATIONS—REQUIRE- MENTS FOR PROPOSALS, PRICE BREAK- DOWN AND NEGOTIATION OF PROFIT.....	
40	SUBCONTRACTORS	
41	USE AND POSSESSION PRIOR TO COMPLE- TION	
42	CLEANING UP	
43	ADDITIONAL DEFINITIONS	
44	ACCIDENT PREVENTION	
45	RIGHTS IN SHOP DRAWINGS	
46	NOTICE TO THE AUTHORITY OF LABOR DISPUTES	
47	CONTRACT PRICES—UNIT PRICE SCHED- ULE	
48	EXAMINATION OF RECORDS	
49	PRICE REDUCTION FOR DEFECTIVE COST OR PRICING DATA—PRICE ADJUST- MENTS	
50	AUDIT—PRICE ADJUSTMENTS	
51	SUBCONTRACTOR COST OR PRICING DATA—PRICE ADJUSTMENTS	
52	PROGRESS PAYMENTS FOR LUMP SUM ITEMS	
53	VARIATIONS IN ESTIMATED QUANTI- TIES	
54	PROGRESS SCHEDULES AND REQUIRE- MENTS FOR MAINTAINING PROGRESS.....	
55	VALUE ENGINEERING INCENTIVE	

Article	Title	Page
56	CERTIFICATION OF NONSEGREGATED FACILITIES BY CONTRACTORS AND SUB-CONTRACTORS	
57	AUTHORIZED REPRESENTATIVE OF THE CONTRACTING OFFICER	
58	FORCE ACCOUNT WORK	
59	EQUIPMENT	
60	WARRANTY OF CONSTRUCTION	
61	AFFIRMATIVE ACTION PLAN	

GENERAL PROVISIONS

1. DEFINITIONS

(a) The term "Authority" as used herein means the Washington Metropolitan Area Transit Authority (created effective February 20, 1967, by Interstate Compact by and between Maryland, Virginia and the District of Columbia, pursuant to Public Law 89-774, approved November 6, 1966.)

(b) The term "Contracting Officer" as used herein means the person executing this contract on behalf of the Authority and includes a duly appointed successor or authorized representative.

. . . .

3. CHANGES

(a) The Contracting Officer may, at any time, without notice to the sureties, by written order designated or indicated to be a change order, make any change in the work within the general scope of the contract, including but not limited to changes:

- (1) in the specifications (including drawings and designs);
- (2) in the method or manner of performance of the work;
- (3) in the Authority-furnished facilities, equipment, materials, services, or site; or
- (4) directing acceleration in the performance of work.

(b) Any other written order or an oral order (which terms as used in this paragraph (b) shall include direction, instruction, interpretation or determination) from the Contracting Officer, which causes any such change, shall be treated as a change order under this article, provided that the Contractor gives the Contracting Officer written notice stating the date, circumstances,

and source of the order and that the Contractor regards the order as a change order.

. . . .

7. PAYMENTS TO CONTRACTOR

(a) The Authority will pay the contract price as hereinafter provided.

(b) The Authority will make progress payments monthly as the work proceeds, or at more frequent intervals as determined by the Contracting Officer, on estimates approved by the Contracting Officer. If requested by the Contracting Officer, the Contractor shall furnish a breakdown of the total contract price or lump sum bid items showing the amount included therein for each principal category of the work, in such detail as requested, to provide a basis for determining progress payments. In the preparation of estimates the Contracting Officer, at his discretion, may authorize material delivered on the site and preparatory work done to be taken into consideration. Material delivered to the Contractor at locations other than the site may also be taken into consideration

(1) if such consideration is specifically authorized by the contract and (2) if the Contractor furnishes satisfactory evidence that he has acquired title to such material and that it will be utilized on the work covered by this contract.

. . . .

10. INSPECTION AND ACCEPTANCE

(a) Except as otherwise provided in this contract, inspection and test by the Authority of material and workmanship required by this contract shall be made at reasonable times and at the site of the work, unless the Contracting Officer determines that such inspection or test of material which is to be incorporated in the work shall be made at the place of production, manufacture, or shipment of such material. To the extent specified by the Contracting Officer at the time of determining to make

off-site inspection or test, such inspection or test shall be conclusive as to whether the material involved conforms to the contract requirements. Such off-site inspection or test shall not relieve the Contractor of responsibility for damage to or loss of the material prior to acceptance, nor in any way affect the continuing rights of the Authority after acceptance of the completed work under the terms of paragraph (f) of this article, except as hereinabove provided.

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11. SUPERINTENDENCE BY CONTRACTOR

The contractor shall give his personal superintendence to the work or have a competent foreman or superintendent, satisfactory to the Contracting Officer, on the work at all times during progress, with authority to act for him.

12. PERMITS AND RESPONSIBILITIES

The Contractor shall, without additional expense to the Authority, be responsible for obtaining any necessary licenses and permits, and for complying with any applicable Federal, State and municipal laws, codes, and regulations, in connection with the prosecution of the work. He shall be similarly responsible for all damages to persons or property that occur as a result of his fault or negligence. He shall take proper safety and health precautions to protect the work, the workers, the public, and the property of others. He shall also be responsible for all materials delivered and work performed until completion and acceptance of the entire construction work, except for any completed unit of construction thereof which theretofore may have been accepted.

. . . .

14. OTHER CONTRACTS

The Authority may undertake or award other contracts for additional work, and the Contractor shall fully coop-

erate with such other contractors and Authority employees and carefully fit his own work to such additional work as may be directed by the Contracting Officer. The Contractor shall not commit or permit any act which will interfere with the performance of work by any other contractor or by Authority employees.

. . . .

20. EQUAL OPPORTUNITY

During the performance of this contract, the Contractor agrees as follows:

(a) The Contractor will not discriminate against any employee or applicant for employment because of race, color, religion, sex, or national origin. The Contractor will take affirmative action to ensure that applicants are employed, and that employees are treated during employment without regard to their race, color, religion, sex, or national origin. Such action shall include, but not be limited to the following: Employment, upgrading, demotion, or transfer; recruitment or recruitment advertising; layoff or termination; rate of pay or other forms of compensation; and selection for training, including apprenticeship. The Contractor agrees to post in conspicuous places, available to employees and applicants for employment, notices to be provided setting forth the provisions of this nondiscrimination article.

(b) The Contractor will, in all solicitations or advertisements for employees placed by or on behalf of the Contractor, state that all qualified applicants will receive consideration for employment without regard to race, color, religion, sex, or national origin.

(c) The Contractor will send to each labor union or representative of workers with which he has a collective bargaining agreement or other contract or understanding, a notice to be provided advising the said labor union or workers' representatives of the Contractor's commit-

ments under this section, and shall post copies of the notice in conspicuous places available to employees and applicants for employment.

(d) The Contractor will comply with all provisions of Executive Order No. 11246 of September 24, 1965, as amended by Executive Order No. 11875 of October 13, 1967, and of the rules, regulations and relevant orders of the Secretary of Labor.

(e) The Contractor will furnish all information and reports required by Executive Order No. 11246 of September 24, 1965, as amended by Executive Order No. 11875 of October 13, 1967, and by rules, regulations, and orders of the Secretary of Labor, or pursuant thereto, and will permit access to his books, records, and accounts by the administering agency and the Secretary of Labor for purposes of investigation to ascertain compliance with such rules, regulations, and orders.

(f) In the event of the Contractor's noncompliance with the nondiscrimination articles of this contract or with any of the said rules, regulations, or orders, this contract may be canceled, terminated, or suspended in whole or in part and the Contractor may be declared ineligible for further Government contracts or federally assisted construction contracts in accordance with procedures authorized in Executive Order No. 11246 of September 24, 1965, as amended by Executive Order No. 11875 of October 13, 1967, and such other sanctions may be imposed and remedies invoked as provided in Executive Order No. 11246 of September 24, 1965, as amended by Executive Order No. 11875 of October 13, 1967, or by rule, regulation, or order of the Secretary of Labor, or as otherwise provided by law.

(g) The Contractor will include the portion of the sentence immediately preceding paragraph (a) and the provisions of paragraphs (a) through (g) in every subcontract or purchase order unless exempted by rules, regula-

tions, or orders of the Secretary of Labor issued pursuant to section 204 of Executive Order No. 11246 of September 24, 1965, as amended by Executive Order No. 11375 of October 13, 1967, so that such provisions will be binding upon each subcontractor or vendor. The Contractor will take such action with respect to any subcontractor or purchase order as the Contracting Officer will direct as a means of enforcing such provisions, including sanctions for noncompliance: Provided, however, That in the event a Contractor becomes involved in, or is threatened with, litigation with a subcontractor or vendor as a result of such direction by the Contracting Officer, the Contractor may request the Authority to enter into such litigation to protect the interests of the Authority.

21. UTILIZATION OF SMALL BUSINESS CONCERNS

(a) It is policy of the Authority that a fair proportion of the purchases and contracts for supplies and services for the Authority be placed with small business concerns.

(b) The Contractor agrees to accomplish the maximum amount of subcontracting to small business concerns that the Contractor finds to be consistent with the efficient performance of this contract.

22. SUSPENSION OF WORK

(a) The Contracting Officer may order the Contractor in writing to suspend, delay, or interrupt all or any part of the work for such period of time as he may determine to be appropriate for the convenience of the Authority.

(b) If the performance of all or any part of the work is, for an unreasonable period of time, suspended, delayed, or interrupted by an act of the Contracting Officer in the administration of this contract, or by his failure to act within the time specified in this contract (or if no time is specified, within a reasonable time), an adjustment shall

be made for any increase in the cost of performance of this contract (excluding profit) necessarily caused by such unreasonable suspension, delay, or interruption and the contract modified in writing accordingly. However, no adjustment shall be made under this article for any suspension, delay, or interruption to the extent (1) that performance would have been so suspended, delayed, or interrupted by any other cause including the fault or negligence of the Contractor or (2) for which an equitable adjustment is provided for or excluded under any other provision of this contract.

(c) No claim under this clause shall be allowed (1) for any costs incurred more than 20 days before the Contractor shall have notified the Contracting Officer in writing of the act or failure to act involved (but this requirement shall not apply as to a claim resulting from a suspension order), and (2) unless the claim, in an amount stated, is asserted in writing as soon as practicable after the termination of such suspension, delay, or interruption, but not later than the date of final payment under the contract.

. . . .

26. PAYROLLS AND BASIC RECORDS

(a) The Contractor shall maintain payrolls and basic records relating thereto during the course of the work and shall preserve them for a period of three years thereafter for all laborers and mechanics, including apprentices, trainees, watchmen, and guards, working at the site of the work. Such records shall contain the name and address of each such employee, his correct classification, rate of pay (including rates of contributions for, or costs assumed to provide, fringe benefits), daily and weekly number of hours worked, deductions made and actual wages paid. Whenever the Contractor has obtained approval from the Secretary of Labor as provided in paragraph (c) of the article entitled "Davis-Bacon Act" he

shall maintain records which show the commitment, its approval, written communication of the plan or program to the laborers or mechanics affected, and the costs anticipated or incurred under the plan or program.

(b) The Contractor shall submit weekly a copy of all payrolls to the Contracting Officer. The Authority Prime Contractor shall be responsible for the submission of copies of payrolls of all subcontractors. The copy shall be accompanied by a statement signed by the Contractor indicating that the payrolls are correct and complete, that the wage rates contained therein are not less than those determined by the Secretary of Labor, and that the classifications set forth for each laborer or mechanic, including apprentices and trainees conform with the work he performed. Submission of the "Weekly Statement of Compliance" required under this contract and the Copeland Regulations of the Secretary of Labor (29 CFR, Part 3) shall satisfy the requirements for submission of the above statement. The Contractor shall submit also a copy of any approval by the Secretary of Labor with respect to fringe benefits which is required by paragraph (c) of the article entitled "Davis-Bacon Act."

(c) The Contractor shall make the records required under this article available for inspection by authorized representatives of the Contracting Officer and the Department of Labor, and shall permit such representatives to interview employees during working hours on the job.

* * * *

29. SUBCONTRACTS

The Contractor agrees to insert the articles hereof entitled "Davis-Bacon Act," "Contract Work Hours and Safety Standards Act—Overtime Compensation," "Apprentices and Trainees," "Payrolls and Basic Records," "Compliance with Copeland Regulations," "Withholding of Funds," "Subcontracts," and "Contract Termination-

Debarment" in all subcontracts. The term "Contractor" as used in such articles in any subcontract shall be deemed to refer to the subcontractor except in the phrase "Authority Prime Contractor."

. . . .

35. COMPOSITION OF CONTRACTOR

If the Contractor hereunder is comprised of more than one legal-entity, each such entity shall be jointly and severally liable hereunder.

. . . .

40. SUBCONTRACTORS

Within seven days after the award of any subcontract either by himself or a subcontractor, the Contractor shall deliver to the Contracting Officer a statement setting forth the name and address of the subcontractor and a summary description of the work subcontracted. The Contractor shall at the same time furnish a statement signed by the subcontractor acknowledging the inclusion in his subcontract of the articles of this contract entitled "Equal Opportunity," "Davis-Bacon Act," "Contract Work Hours Standards Act-Overtime Compensation," "Apprentices," "Payrolls and Basic Records," "Compliance with Copeland Regulations," "Withholding of Funds," "Subcontracts" and "Contract Termination-Debarment." Nothing contained in this contract shall create any contractual relation between the subcontractor and the Authority.

. . . .

44. ACCIDENT PREVENTION

(a) In order to provide safety controls for protection to the life and health of employees and other persons, for prevention of damage to property, materials, supplies, and equipment, and for avoidance of work interruptions in the performance of this contract, the Contractor shall

comply with all pertinent provisions of Article 7.A "Safety Requirements" of the General Requirements, and will also take or cause to be taken such additional measures as the Contracting Officer may determine to be reasonably necessary for the purpose.

(b) The Contractor will maintain an accurate record of, and will report to the Contracting Officer in the manner and on the forms prescribed by the Contracting Officer, exposure data and all accidents resulting in death, traumatic injury, occupational disease, and damage to property materials supplies and equipment incidental to work performed under this contract.

(c) The Contracting Officer will notify the Contractor of any noncompliance with the foregoing provisions and the action to be taken. The Contractor shall, after receipt of such notice, immediately take corrective action. Such notice, when delivered to the Contractor or his representative at the site of the work, shall be deemed sufficient for the purpose. If the Contractor fails or refuses to comply promptly, the Contracting Officer may issue an order stopping all or part of the work until satisfactory corrective action has been taken. No part of the time lost due to any such stop orders shall be made the subject of claim for extension of time or for excess costs or damages by the Contractor.

(d) Compliance with the provisions of this article by subcontractors will be the responsibility of the Contractor.

(e) Prior to commencement of the work the Contractor will:

(1) submit in writing his proposals for effectuating this provision for accident prevention;

(2) meet in conference with representatives of the Contracting Officer to discuss and develop mutual understandings relative to administration of the over-all safety program.

. . . .

56. CERTIFICATION OF NONSEGREGATED FACILITIES BY CONTRACTORS AND SUBCONTRACTORS

(a) Prior to the award of any subcontract, or federally assisted construction contract or subcontract, required to contain the Equal Opportunity article contained in this Contract, the Contractor shall obtain the certification set forth in the Invitation of Bids. This certification may be required by the Contractor, either for each subcontract or for all subcontracts during a period (i.e., quarterly, semiannually, or annually).

. . . .

58. FORCE ACCOUNT WORK

(a) In the event equitable adjustments pursuant to the "Changes" article of these General Provisions cannot be agreed to in a timely manner, the Contracting Officer reserves the right to order work on the force account basis. When work is ordered under this article and notwithstanding the provisions of the "Changes" article, compensation for this work shall be determined as hereinafter provided and shall constitute the total compensation to be paid for the changes to the work. The labor, materials and equipment used in the performance of such work shall be subject to the approval of the engineer.

(b) Work Performed By or For Contractor: Labor, materials, and equipment shall be furnished by the Contractor or by a Subcontractor or by others on behalf of the Contractor. The Contractor will be paid therefor as hereinafter provided, except where agreement has been reached to pay in accordance with paragraph (c) below. The following percentages will be added to the totals computed as provided in the following paragraphs (b) (1) through (b) (4):

Labor	18 percent
Materials	15 percent
Equipment	10 percent

To the total computed under paragraphs (b) (1) through (b) (4) and the above percentages, only one additional 10 percent mark-up for subcontract work will be granted regardless of the tier of subcontractor who performs the work, and one percent will be added for Contractor's bond. For the purposes of this article, "Subcontractor" is defined as an individual, partnership, corporation, association, joint venture, or any combination thereof, who contracts with the Contractor to perform work or labor or render service on or about the work. The term Subcontractor shall not include those who supply materials only. When work paid for on a force account basis is performed by forces other than the Contractor's organization, the Contractor shall reach agreement with such other forces as to the distribution of the payment made by the Authority for such work and no additional payment therefor will be made by the Authority by reason of performance of the work by a Subcontractor or by others.

(1) Labor: The cost of labor used in performing the work, whether the employer is the Contractor, subcontractor, or other forces, will be the sum of the following:

A. The gross actual wages paid including income tax withholdings but not including any employer payments to or on behalf of workmen for health and welfare, pension, vacation, insurance, and similar purposes.

B. To the actual gross wages, as defined in paragraph (b) (1) A, will be applied a percentage based upon current applicable labor rates concerning payments made to or on behalf of workmen other than actual wages, which percentage shall constitute full compensation for all payments other than actual gross wages as defined in paragraph (b) (1) A above and subsistence and travel allowance as specified in paragraph (b) (1) C, below. The Contractor shall compute a separate percentage for each craft, or a composite percentage for all crafts if so approved by the Engineer. All computed percentages shall be submitted to the Engineer for approval within 90

days after receipt of Notice to Proceed or as directed by the Engineer prior to any force account work being performed.

C. Subsistence and travel allowance paid to such workmen if required by collective bargaining agreements.

The charges for labor shall include all classifications through foremen when engaged in the actual and direct performance of the work. They shall not include charges for such overhead personnel as assistant superintendents, superintendents, office personnel, timekeepers, and maintenance mechanics.

(2) Materials: The cost of materials required for the accomplishment of the work will be delivered cost to the purchaser, whether Contractor, subcontractor or other forces, from the supplier thereof, except as the following are applicable:

A. If a cash or trade discount by the actual supplier is offered or available to the purchaser, it shall be credited to the Authority notwithstanding the fact that such discount may not have been taken.

B. If materials are procured by the purchaser by any method which is not a direct purchase from and a direct billing by the actual supplier to such purchaser, the cost of such materials, including handling, shall be deemed to be the price to the actual supplier as determined by the Engineer.

C. If the materials are obtained from a supply or source owned wholly or in part by the purchaser, payment therefor will not exceed the price paid by the purchaser for similar materials furnished from said source on contract items or the current wholesale price for such materials delivered to the job site, whichever price is lower.

D. The cost of such materials shall not exceed the lowest current wholesale prices at which such materials

are available in the quantities concerned, delivered to the job site, less any discounts as provided in paragraph (b) (2) A, above.

E. If the Contractor does not furnish satisfactory evidence of the cost of such materials from the actual supplier thereof, the cost shall then be determined in accordance with paragraph (b) (2) D, above.

The Contractor shall not be compensated for indirect costs and profit on Authority furnished materials.

(3) Equipment: The Contractor shall be paid for the use of equipment in accordance with the "Payment for Use of Equipment" article of the General Requirements. The Contractor shall furnish all data which might assist the Engineer in the establishment of such rates.

A. Operators of equipment will be paid as provided under paragraph (b) (1), above.

(4) Subcontracts: The cost for subcontract work will be the actual cost to the Contractor for work performed by a subcontractor as computed in accordance with paragraph (b) above.

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61. AFFIRMATIVE ACTION PROGRAM

(a) The Affirmative Action Program submitted in accordance with the instructions to Bidders, Paragraph 17 (b) (4) shall be implemented and maintained in force by the Contractor during the term of the contract and be made available to affected minority groups. If such Program is denied a group, the burden shall be on the Contractor to show that the group is not an affected group. Emphasis is placed on the following requirements not to the exclusion of other requirements of these instructions or the contract documents:

(1) To ensure equal employment opportunity in the construction of Metro, the Contractor shall recruit minor-

ity persons necessary to meet the requirements of the Affirmative Action Program and involve to the fullest, local vocational institutions, and trade unions in the effort. Minorities shall be afforded every reasonable opportunity for training and advancement to ensure quality with non-minority employees. The Contractor, insofar as practicable, shall employ in the performance of the work, qualified citizens who are residents of the area comprising the Authority Transit Zone.

(2) It is the policy of the Authority that equal opportunity to participate in Authority procurements be provided to minority business enterprises. In order to ensure that a fair proportion of the purchases and contracts for supplies and services for the Authority are placed with minority business enterprises, the Contractor agrees to take affirmative action, to the fullest extent consistent with sufficient construction of the Metro System, to identify qualified minority business firms, solicit bids and quotations from them, and in making awards and purchases, give equitable consideration to minority business enterprises. The method for accomplishing this shall be as delineated in the Affirmative Action Program submitted to the Contracting Officer prior to award of the contract, and shall include:

A. Arranging solicitations, time for the preparation of bids and offers, quantities, specifications, and delivery and payment schedules so as to facilitate the participation of minority group enterprises in the construction of Metro System.

B. Affording minority group enterprises within the Washington Metropolitan Area realistic notice of each subcontract, opportunity to bid for it, and encouragement to do so.

C. Providing, where no conflict of interest exists, technical guidance and counseling to any minority group enterprise which seeks or needs assistance in competing

for subcontracts, and to make known to the minority group community in the area of solicitation referred to in the preceding subparagraph that these services are available.

(3) The Contractor shall provide for and maintain a full time Equal Employment Opportunity Officer (EEO) to implement the Affirmative Action Program on those contracts exceeding \$2,500,000. On contracts of a lesser amount, the Contractor will designate a person part time to act as the EEO Officer. The EEO Officer shall be the liaison between the Contractor and the Contracting Officer's authorized representative with regard to the submission of required or requested EEO reports and shall record his efforts to inform the minority community of available employment with the Contractor and record their responses. The EEO Officer shall also investigate and make every reasonable effort to resolve all complaints of discrimination based on race, sex, religion or national origin within the company and the contractor's work force at the construction site. Failure to resolve such problems shall be reported in writing to the Contracting Officer.

(4) The Contractor shall implement a uniform method of keeping data concerning ethnic classifications of all personnel and furnish all subcontractors with guidelines to develop a system of maintaining such records. The company format for such data keeping shall be as submitted to the Contracting Officer prior to the award of the contract. Where the Contractor, after reasonable efforts, is unable to locate sufficient minority persons and/or businesses to carry out the intent of the Affirmative Action Program, the Contracting Officer will; (a) Review the documentation recording the Contractor's efforts, and (b) Offer to the Contractor any reasonable alternatives or additional resources. The Contractor efforts and Contracting Officer's review of these efforts should normally be accomplished in a time period of 30 days after Notice

to Proceed during which time the Contractor shall proceed with his adopted construction schedule.

(5) The Contractor shall publicly display in every employment advertisement that it practices equal opportunity employment. Additionally, posters issued by the Equal Employment Opportunity Commission and the Office of Federal Contract Compliance shall be posted in places highly visible to all workers, supervisors and employees.

(6) The Contractor shall make contact with local Contractor Associations and other organizations whose purpose is to promote equal employment opportunity.

(7) The Contractor shall maintain a program for the advancement of apprentices. Apprentices shall be advanced in the trade as their abilities develop in accordance with the requirements of the apprentice training program of the Manpower Development Training Program.

(8) With respect to subcontractors, the Contractor shall:

A. Determine those areas in which minority subcontractors may be used.

B. Determine if there are minority subcontractors available to perform such contract work and identify them.

C. Contact the WMATA Office of Minority Development if assistance in identifying minority contractor capability is needed.

D. Solicit bids from these subcontractors and award as appropriate.

(9) The Contractor shall consult with the minority subcontractors regarding the Contractor's requirements as they pertain to ability to perform, financial stability, and the utilization of subcontracts.

(10) For the purpose of this program, "minority group enterprise" means any sole proprietorship, partnership, or corporation of which the proprietor, at least half of the partners, or at least half of the Board of Directors, officers, or those exercising effective control, respectively, are minority group members.

(11) The primary obligation to establish and maintain a complete and effective program rests with the Contractor.

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DIVISION 1—GENERAL REQUIREMENTS

Section No.	Title
101	GENERAL REQUIREMENTS

SECTION 101—GENERAL REQUIREMENTS
TABLE OF CONTENTS

Article	Title	Page
1.	CONTRACT DOCUMENTS	
	A. Intent of Contract Documents	
	B. Definitions	
	C. Contract and Bonds	
	D. Technical Reference Abbreviations	
2.	AUTHORITY	
	A. Defintions	
	B. Contract Work	
	C. Authority Furnished Documents	
3.	CONTRACTOR	
	A. Conditions Affecting the Work	
	(1) Physical Conditions	
	(2) Groundwater Conditions	
	(3) Measurements	
	B. Contractor's Submissions	
	(1) Shop Drawings	
	(2) Working Drawings	
	(3) Samples	
	(4) Operation and Maintenance Manuals	
	(5) Specified Submittals	
	C. Community Relations	
	D. Construction Procedures	
	(1) Work to be Performed by the Contractor....	
	(2) Preconstruction Inspection	
	(3) Layout of Work	
	(4) Mobilization and Preparatory Work.....	
	(5) Contractor's Plant	
	(6) Engineer's Facility	
	(7) Engineer's Change House Facility	

Article	Title	Page
(8)	Signs	
(9)	Construction Sequence	
(10)	Construction Staging	
(11)	Maintenance of Traffic	
(12)	Access to Adjacent Property	
(13)	Access to Fire Hydrants and Fire Alarm Boxes	
(14)	Protective Devices	
(15)	Working Area Wooden Fencing	
(16)	Detection of Movement	
(17)	Availability of Utility Services	
(18)	Utilities	
(19)	Work on Railroad Property	
(20)	Use of Explosives	
(21)	Work on or under National Park Service Land	
(22)	Historical or Scientific Specimens	
(23)	Sanitary Provisions	
(24)	Work Storage and Parking Area	
(25)	Pollution Abatement	
(26)	Environmental Control	
(27)	Photographs	
(28)	Salvage Material and Equipment	
(29)	Pavement Restoration	
(30)	Restoration of Miscellaneous Surface Fa- cilities	
E. Labor		
(1)	Hours of Work	
(2)	Contractor's Employees	
(3)	Wage Rates	
F. Licenses		
(1)	Contractor's License	
4. SUBCONTRACTS		
A. Subcontracts		
5. SEPARATE CONTRACTS		
A. Work By Others		

Article	Title	Page
6.	SCHEDULES AND PAYMENT	
A.	Progress Schedules—Network Analysis	
B.	Determination of Progress	
C.	Payment for Use of Equipment	
7.	PROTECTION OF PERSONS AND PROPERTY	
A.	Safety Requirements	
8.	INSURANCE	
A.	Indemnification and Insurance	
(1)	Indemnification	
(2)	Insurance	
(3)	Special Provisions of Insurance Furnished by Contractor	
9.	COMMENCEMENT, PROSECUTION AND COM- PLETION OF WORK	
A.	Work Commencement	
B.	Interim Work Completion	
C.	Final Work Completion	
D.	Liquidated Damages	

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4. SUBCONTRACTS

A. Subcontracts:

(1) The division or sections of the Specifications are not intended to control the Contractor in dividing the work among subcontractors, or to limit the work performed by any trade.

(2) The Contractor shall not enter into subcontracts totaling in amount more than the percentage of the total contract price permissible under the General Requirements, without the written permission of the Contracting Officer.

(3) Before entering into any subcontracts, the Contractor shall submit a written statement to the Contracting Officer giving the name and address of the proposed subcontractor, the portion of the work and material which he is to perform and furnish, and any other information tending to prove that the proposed subcontractor has the necessary facilities, skill integrity, past experience and financial resources to perform the work in accordance with the terms and conditions of this Contract.

(4) If the Contracting Officer finds that the proposed subcontractor is qualified, he will notify the Contractor within ten days. If the determination is to the contrary, however, the Contracting Officer will, within ten days, notify the Contractor who may thereupon submit the name of another proposed subcontractor unless he decides to do the work himself.

(5) The Contracting Officer's approval of a subcontractor shall not relieve the Contractor of any of his responsibilities, duties, and liabilities hereunder. The Contractor shall be solely responsible to the Authority for the acts or defaults of his subcontractor and of such sub-

contractor's officers, agents and employees, each of whom shall, for this purpose, be deemed to be the agent and employees of the Contractor to the extent of his subcontract. He shall also be responsible for the coordination of the work of the trades, subcontractors and material men.

(6) No subcontractor shall be permitted to perform work at the site until he, or the Contractor, in compliance with the provisions of the "Indemnification and Insurance" Article of these General Requirements, has furnished satisfactory evidence of insurance as required.

(7) The Contractor shall promptly, upon request, file with the Engineer a conformed copy of the subcontract, with the price and terms of payment deleted.

(8) The Authority or its representatives will not undertake to settle any difference between the Contractor and his Subcontractors, or between Subcontractors.

5. SEPARATE CONTRACTS

A. Work by Others:

(1) This Contract is one of a series of contracts for the construction of the Washington Metropolitan Area Transit System. During the progress of the work under this Contract it will be necessary for other contractors and persons employed by the Authority to work in or about the project. The Authority reserves the right to put such other contractors to work and to afford such access to the site of the work to be performed hereunder at such times as the Authority deems proper. The Contractor shall not impede or interfere with the work of such other contractors engaged in or about the work and shall so arrange and conduct his work that such other contractors may complete their work at the earliest date possible. The cooperation of the Contractor with the other contractors is mandatory.

(2) The exercise of such reserved right aforesaid by the Authority to permit other contractors and

persons to do work in or about the contract area shall in no way nor to any extent relieve the Contractor from liability for all loss and damage to the work due to or resulting from his operations.

(3) The Engineer will decide any disputed questions regarding the performance of the work, access to and clearing up of the site.

(4) The Contractor shall advise the Engineer in writing of all agreements pertaining to coordinating his work with the work of other contractors engaged upon the project and priority of performance between the various contractors.

(5) Provisions similar to the above shall apply to the relations between the Contractor and Utility Companies performing work in connection with Metro construction.

(6) The Contractor shall cooperate with all other contractors requiring access to the work, regarding access to the site, maintenance of security, temporary facilities, cleaning of the site, and like matters requiring common effort.

. . . .

7. PROTECTION OF PERSONS AND PROPERTY

A. Safety Requirements:

(1) The Contractor shall be responsible for ensuring that the most stringent provisions of the applicable statutes and regulations of the District of Columbia, State of Maryland, Commonwealth of Virginia, or political subdivision in which the work is being performed, as well as the Metro Coordinated Safety Program and Reporting Procedures Manual issued by the Authority, and the Department of Labor-Occupational Safety and Health Administration provisions, pertaining to the safe performance of the work are observed. Further, that the methods of performing the work do not involve undue danger to the personnel employed thereon, the public, and

public and private property. Should charges of violation of any of the above be issued to the Contractor in the course of the work, a copy of each charge shall immediately be forwarded to the Engineer.

(2) The Contractor shall employ and assign to the work a full-time safety superintendent who has specialized training and substantial experience in construction safety supervision. He shall have a working knowledge of all U.S. Department of Labor (OSHA) regulations. He shall have the ability to develop and conduct safety training courses. He shall be familiar with industrial hygiene equipment and testing as required for the protection of all employees. The safety superintendent shall be employed exclusively for the purpose of supervising the safety of persons on or about the work and the property affected thereby. The safety superintendent must be acceptable to the Contracting Officer, and his performance will be reviewed by the Contracting Officer on a continuing basis. If the safety superintendent's effectiveness is below standard, the Contractor shall replace him at the Contracting Officer's direction. Once employed, the safety superintendent shall not be changed without permission of the Contracting Officer.

(3) First-Aid Stations: A first-aid station shall be established at the site of the work and fully equipped. A certified first-aid attendant shall be on duty in the station at all times when work is in progress except when on emergency calls.

8. INSURANCE

A. Indemnification and Insurance:

(1) Indemnification:

a. The Contractor shall save and keep harmless and indemnify the Authority against any and all liability claims, and the costs of whatsoever kind of nature arising or alleged to arise for injury, including personal

injury to or death of any person or persons, and for loss or damage to any property; occurring in connection with or in any way incident to or arising out of the occupancy, use, service, operations, or performance of work in connection with this Contract, resulting in whole or in part from the negligent acts, errors or omissions of the Contractor, any subcontractor, or any employee, agent or representative of the Contractor or subcontractors.

b. The Contractor and his subcontractors of all tiers shall also indemnify the Authority's General Construction Consultant against liabilities arising out of the Contractor's work. Such indemnification shall be limited to the assumed liability for which coverage is afforded for the Contractor and such subcontractors under the Authority's Coordinated Insurance Program.

(2) Insurance:

a. The Authority will procure and pay premiums for insurance for the benefit of the Contractor (among others) as set forth in the WMATA Insurance Specifications.

b. The Contractor will procure and pay premiums for Comprehensive Automobile Liability Insurance covering the use of all owned, non-owned, hired, rented or leased vehicles to be used in the performance of this Contract, and not covered under the comprehensive general liability insurance to be provided by the Authority. The coverage under such policy, or policies, shall not be less than a Combined Single Limit for Bodily Injury Liability and Property Damage Liability of \$300,000 each occurrence.

(3) Special Provisions of Insurance Furnished by Contractor:

a. All insurance shall be procured from insurance or indemnity companies acceptable to the Authority and licensed and authorized to do business in the Dis-

trict of Columbia and/or the States of Maryland and Virginia. Authority approval or failure to disapprove insurance furnished by the Contractor shall not release the Contractor of full responsibility for liability damage and accidents as set forth herein.

b. The Contractor shall forward to the Contracting Officer for approval a certificate or certificates, issued by the insurer(s), of the insurance required under the foregoing provisions, including special endorsements. Such certificate(s) shall be in a form satisfactory to the Authority and shall list the various coverages and limits. This insurance will contain the provision that 30 days prior written notice will be given the Contracting Officer in the event either the Contractor or his insurer(s) substantially changes, cancels or refuses to renew this insurance; notice by insurer(s) to be sent to the Contracting Officer. The Contractor shall promptly furnish, if requested by the Contracting Officer, a duplicate original of each insurance policy.

c. If at any time the above required insurance policies should be cancelled, terminated or modified so that the insurance is not in full force and effect as required herein, the Contracting Officer may terminate this Contract for default or obtain insurance coverage equal to that required herein, the full cost of which shall be charged to the Contractor and deducted from any payments due the Contractor.

d. The Contractor shall require his subcontractors, at all tiers, to carry the insurance coverages required herein. In compliance with the insurance requirements specified herein the Contractor may have at his option, the insurance coverages required herein provided by the Contractor's insurer for all or any of his subcontractors at all tiers and if so elected by the Contractor the evidence of insurance submitted shall so stipulate.

e. Any contract of insurance or indemnification naming the Authority, the United States of America or any of its departments, agencies, administrations or authorities, shall be endorsed to provide that the insurer will not contend in the event of any occurrence, accident, or claim that the Authority or the United States of America, et al, are not liable in tort by virtue of the fact of being governmental instrumentalities or public or quasi-public bodies.

f. No separate payment will be made for providing insurance as prescribed herein but the cost thereof shall be included in the prices for the various items as set forth in the Unit Price Schedule.

g. In the event the required certificates of insurance as specified herein are not furnished within 10 calendar days after date of award of the Contract, the Contracting Officer may issue the notice to proceed and contract time will start upon its receipt as specified in the "Project Scheduling" Article of these General Requirements. However, in no event shall work at the site be performed until the required certificates of insurance have been furnished.

. . . .

[Attached as Exhibit #2 to the Deposition of
Robert R. Thompson filed on November 9, 1982
in *Wilmes v. Bechtel Civil and Minerals,*
Inc., et al., C.A. No. 81-0114.]

LOCATION CODES, December 1981

Numbers and Subcontractors	Contractors	19Z Contract
1000	Granite Construction Company	1B0042
1001-15	Various Sub-Contractors Job Completed 1974	(DC)
1000	Excavation Construction Company Job Completed 1972	1C0063 (VA)
1000	Square-Lafra	1C0071
1001-22	Various Sub-Contractors Job Completed 1975	(VA)
1000	Norair Engineering Corporation	1B0031
1001-6	Various Sub-Contractors Job Completed 1974	(DC)
1000	Norair Engineering Corporation	1C0062
1001-21	Various Sub-Contractors Job Completed 1976	(VA)
1000	Norair Engineering Corporation	1B0033
1001-32	Various Sub-Contractors Job Completed 1972	(DC)
1000	Hughes and Smith, Inc.	1C0064
1001-9	Various Sub-Contractors Job Completed 1972	(VA)
01000	Whiting Corporation	1Z4021
01000	Westinghouse Electric Corporation	1Z4051
01001-6	Various Sub-Contractors Job Completed 1978	(DC)
01000	Bechtel Corporation	1Z3262 (DC)
01000	Square-Lefra	1B0041
01001-3	Various Sub-Contractors Job Completed 1971	(DC)
01000	Fred J. Early, Jr. Company/	1C0011
01001-34	Massaman Construction Company (JV)	(DC)
01001-34	Various Sub-Contractors Job Completed 1976	

Numbers and Subcontractors	Contractors	19Z Contract
01000	Newton Asphalt	1J0082
01001-4	Various Sub Contractors Job Completed 1977	(VA)
* * *		
11801009	E.P.I. Architectural Systems, Inc.	
11801010	D & R, Inc.	
11801011	D & R Roofing and Sheet Metal	
11801012	A & P Contracting	
11801013	Webb Builder Hardware	
11801014	Prospect Industries, Inc.	
11801015	Nova Mechanical Construction, Inc.	
11801016	Standard Erecting Company	
11801017	Long Fence Construction Company	
11801018	Kasmer Electrical Contracting	
11801019	Peter Bratti Associates	
11801020	Superior Fireproofing Door Company	
11801021	Tonstad Caulking Company	
11801022	Trio Industries, Inc.	
11801023	Washington Plate Glass Company, Inc.	
11801024	tyroc, Inc.	
11801025	H & P Hauling	
11801026	Seaboard Foundations	
11801027	Underground Technology Development	
11801028	Shug Associates	
11801029	Carl M. Wever Steel Company, Inc.	
11801030	Allied Strpping, Inc.	
11801031	Keystone Steel Construction	
11801032	D.I. Chapman	
11801033	Sacc	
11801034	Flaherty Iron Works	
11801035	Karon Masonry, Inc.	
11801036	Pagley Security Specialist	
11801037	Hamilton and Spiegel	
11801038	A & R Insulation	
11801039	Overhead Door Company	
11801040	Comfort Control	
11801041	Pricement Construction	
11801042	Corson and Gruman	
11801043	The Fingles Company	
11901000	Williams Enterprises, Inc. Job Completed—1977	1C4062 (VA)
12001000	C.D.P.C. Construction Company Job Completed—1977	1A0083 (DC)

Numbers and Subcontractors	Contractors	19Z Contract
12101000	Ball Healy Granite	
12101001	District Utilities	1A0062
12101002	Geo-Facts, Inc.	(DC)
12101003	Western Caissons, Inc.	
12101004	Tunnel Electric	
12101005	Keystone Steel Company	
12101006	R.M. Thornton	
12101007	Peter Mitchell, Inc.	
12101008	Jones & Artis Construction Company	
12101009	Floating Slab Contractors	
12101010	Warren-Ehret-Linck Company	
12101011	Omega Equipment Company	
12101012	Zonver-Jarrett Foundation Company	
12101013	Tonstad Caulking Company, Inc.	
12101014	Corson & Gruman	

[Attached as Exhibit #2 to the Deposition of Delmer Ison
filed on November 17, 1982 in *Wilmes v. Bechtel Civil
and Minerals, Inc., et al.*, C.A. No. 81-0114]

Washington Metropolitan Area Transit Authority

CONSTRUCTION CONTRACT

CONTRACTOR:	Contract No. 1A0062
Gordon H. Ball, Inc., S. A. Healy Company and Granite Construction Company (A Joint Venture) 6845 Elm Street Suite 212 McLean, Virginia 22101	Date: Jun. 17, 1976

CONTRACT FOR: Section A-6b, Rockville Route, Zoologi-
cal Park, Cleveland Park and Van Ness
—All Stations

CONTRACT PRICE: \$70,933,105

PERIOD OF PERFORMANCE: Within 1185 calendar days
after Receipt of Notice to
Proceed

In consideration of the covenants contained herein, the Washington Metropolitan Area Transit Authority (hereinafter called the Authority), represented by the Contracting Officer executing this contract, and the individual, partnership, joint venture, or corporation named above (hereinafter called the Contractor), mutually agree to perform this contract in strict accordance with the General Provisions, Labor Standards Provisions Applicable to Contracts in Excess of \$2,000, and the following designated specifications, schedules, drawings, and conditions:

1. Specification No. 1FB-C-174
 2. Bid Form No. 1FB-C-174
 3. Amendments 1-8, inclusive
 4. Drawings as listed in Appendix C: Special Conditions
- ALTERATIONS. The following alterations were made in this contract before it was signed by the parties hereto:

In Witness Whereof, the parties hereto have executed this contract as of the date entered above.

GORDON S. BALL, INC.
Contractor

By /s/ Hugh N. Mize, Jr.
HUGH N. MIZE, JR.
Vice President

ATTEST: /s/ R. A. Roberts
R. A. ROBERTS
Assistant Secretary

S. A. HEALY COMPANY
Contractor

By /s/ Donald J. Zier
President

ATTEST: /s/ George J. Malina
GEORGE J. MALINA
Assistant Secretary

GRANITE CONSTRUCTION
COMPANY
Contractor

By /s/ H. B. Scott
H. B. SCOTT, President

ATTEST: /s/ Leo R. Westwater
LEO R. WESTWATER
Secretary

WASHINGTON METROPOLITAN
AREA TRANSIT AUTHORITY

By /s/ R—— M. Dodge
Contracting Officer

ATTEST: /s/ Delmer Ison
Secretary

NOTE: Execution for the Contractor shall be accompanied by a Power of Execution and Certification of that counsel.

[Attached as Exhibit A to the Plaintiff's Memorandum
of Points and Authorities in Support of His Motion to
Amend the Complaint filed on November 19, 1982
in *Wilmes v. Bechtel Civil and Minerals, Inc.,
et al.*, C.A. No. 81-0114]

Certificate of Insurance

LUMBERMEN'S MUTUAL CASUALTY COMPANY

THE CERTIFICATE IS ISSUED AT THE REQUEST OF:

Gordon N. Ball, Inc., S. A. Nealy Company
and Granite Construction Company
(A Joint Venture)
2845 Elm Street, Suite 212
Pleasant, VA 22101

DATE ISSUED: July 6, 1976

IS POLICIES INDICATED BELOW HAVE BEEN ISSUED TO:

Washington Metropolitan Area Transit Authority (WMATA)
600 Fifth Street, N. W.
Washington, D. C. 20001
And / / were / /

GORDON N. BALL, INC., S.A. NEALY COMPANY AND GRANITE CONSTRUCTION CO. (JV)

POLICY FORM	POLICY NUMBER	POLICY PERIOD	COVERAGE AND LIMITS OF LIABILITY
Workmen Compensation and Employers Liability	1CL751451	7-30-71 UNTIL CANCELLED	Laws of District of Columbia, Maryland and Virginia Coverage B - \$1,000,000
Comprehensive General Liability	1VL751451	7-30-71 UNTIL CANCELLED	\$5,000,000 each occurrence (XI & VD combined) each insured \$5,000,000 annual aggregate (when applicable) each insured \$25,000,000 aggregate each occurrence all insureds

DESCRIPTION OF OPERATIONS AND LOCATIONS TO WHICH CERTIFICATE APPLIES

Neire Construction under WMATA Prime Contract No. 1A006Z

This certificate of insurance neither affirmatively nor negatively attests to or alters the coverage afforded by the above mentioned policies.

KEY CODE: 121-21000

END W Long Grove, Illinois

BE Asquith

INSURANCE DEPARTMENT

U.S. DEPARTMENT OF LABOR EMPLOYMENT STANDARDS ADMINISTRATION OFFICE OF WORKERS' COMPENSATION PROGRAMS		NOTICE TO THE DEPUTY COMMISSIONER THAT RIGHT TO COMPENSATION IS CONTESTED	
NOTE: This form must be completed, in duplicate, and submitted to the Deputy Commissioner on or before the 14th day after the employer has knowledge of the alleged injury or death, whenever the right of the claimant to compensation is contested. (33 U.S.C. 914(c)). The Deputy Commissioner will forward a copy of the notice to the claimant.		OFFICIAL USE ONLY Case No. 202 CU 100317 H Ins. carrier's No. Date received	
<input type="checkbox"/> Longshoremen's and Harbor Workers' Compensation Act <input checked="" type="checkbox"/> District of Columbia Workers' Compensation Act		<input type="checkbox"/> Outer Continental Shelf Lands Act <input type="checkbox"/> Defense Base Act <input type="checkbox"/> Nonappropriated Fund Instrumentalities Act	
1a. Employer's name Bell Healy Granite		b. Address (Street, No., City, State, Zip code) P.O. Box 11002 Washington, D.C. 20008	
2a. Claimant's name Stanley Wilms		b. Address (Street, No., City, State, Zip code) 601 Four Mile Rd. Alexandria, Virginia	
3. Date of alleged injury or death 01/01/78	4. Time of injury Unknown	5. Earliest date employer had knowledge of injury or accident Unknown	6. Can disposition of this case be made without a formal hearing? <input checked="" type="checkbox"/> Yes <input type="checkbox"/> No
7. Nature of alleged injury or occupational disease Silicosis			
8. This case is contested for the following reasons (State specific reasons and describe evidence relied upon and set out summary conclusions. The contestation must show valid legal objections to the payment of compensation.) Carrier raises issues of Accident, Notice, Nature & Extent of injury; causally related disability, occupational disease, and all others.			
9. Name of insurance carrier Lumbermens Mutual Casualty Company		10. Date of notice 01/18/79	
11a. Official's signature A.O. Francis		b. Title Adrienne Francis/Clerical Representative	

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 81-0114
(Judge Flannery)

STANLEY WILMES,
Plaintiff,
v.

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY,
Defendant.

Washington, D.C.

Wednesday, November 3, 1982

DEPOSITION OF DELMER ISON,

a witness, was called for examination by counsel for the plaintiff, pursuant to Notice and agreement of the parties as to time and date, beginning at approximately 10:00 o'clock, a.m., in the law offices of Ashcraft & Gerel, Esquires, 2000 L Street, Northwest, Washington, D.C. 20036, before Norma Nasuti Costello, a Notary Public in and for the District of Columbia, when were present on behalf of the respective parties:

[2]

APPEARANCE OF COUNSEL

For the Plaintiff:

ASHCRAFT & GEREL, ESQUIRES
 By: WILLIAM F. MULRONEY, ESQUIRE
 JAMES M. HANNY, ESQUIRE
 2000 L Street, Northwest
 Washington, D.C. 20036

For the Defendant:

HOGAN & HARTSON, ESQUIRES
 By: VINCENT H. COHEN, ESQUIRE
 ROBERT B. CAVE, ESQUIRE
 SUSAN M. HOFFMAN, ESQUIRE
 815 Connecticut Avenue
 Washington, D.C. 20006

INDEX

Witness:

Page

Delmer Ison

Examination by Mr. Mulroney	
Examination by Mr. Cohen	
Further Examination by Mr. Mulroney	
Further Examination by Mr. Cohen	

Exhibits:

Plaintiff's Exhibit Number 1 for Identification to the Ison deposition (Affidavit of Delmer Ison)	
Plaintiff's Exhibit Number 2 for Identification to the Ison deposition (Contract for Section A-6b, dated 6/17/76)	

[3]

Plaintiff's Exhibit Number 3 for Identification to the Ison deposition (General Provisions and Standard Specifications)	
Plaintiff's Exhibit Number 4 for Identification to the Ison deposition (Coordinated Safety Program & Re- porting Procedures)	

Plaintiff's Exhibit Number 5 for Identification to the
 Ison deposition (Diagram—Construction Contracts)..
 Plaintiff's Exhibit Number 6 for Identification to the
 Ison deposition (Contract—Fruin-Colnon)
 Plaintiff's Exhibit Number 7 for Identification to the
 Ison deposition (Department of Design and Construc-
 tion brochure)

Defendant's Exhibit Number 1 for Identification to the
 Ison deposition (Department of Design and Construc-
 tion brochure)

Defendant's Exhibit Number 2 for Identification to the
 Ison deposition (List of various subcontractors who
 worked on A-6b)

Defendant's Exhibit Number 3 for Identification to the
 Ison deposition (Specs of WMATA Coordinated In-
 surance Program)

Defendant's Exhibit Number 4 for Identification to the
 Ison deposition (Contract for Section A-6b, dated
 6/17/76, with attachments: Coordinated Safety Pro-
 gram, General Provisions and Standards, 1973)

Defendant's Exhibit Number 5 for Identification to the
 Ison deposition (Section 4 of D.C. Code 1-2431)

[4]

Defendant's Exhibit Number 6 for Identification to the
 Ison deposition (Section 12 of D.C. Code 1-2431)

Defendant's Exhibit Number 7 for Identification to the
 Ison deposition (Opposition to Defendant WMATA's
 Motion for a Protective Order)

Defendant's Exhibit Number 8 for Identification to the
 Ison deposition (Notice of Deposition, date of service
 9/18/82)

Defendant's Exhibit Number 9 for Identification to the
 Ison deposition (Affidavit of Delmer Ison)

Defendant's Exhibit Number 10 for Identification to the
 Ison deposition ("The Daily Washington Law Re-
 porter")

Defendant's Exhibit Number 11 for Identification to the
 Ison deposition (Construction Contract—Keith Col-
 lier)

[5] (Thereupon, documents were marked as Plaintiff's Exhibit Numbers 1 through 7 and also Defendant's Exhibit Numbers 1 through 10 for identification to the Ison deposition.)

MR. COHEN: In the process of marking the documents for identification for the Defendant WMATA, the attorney for the defendant, WMATA, Mr. Vincent H. Cohen, wants it noted that Defendant's WMATA Exhibit No. 3, which is the specifications of the WMATA Coordinated Insurance Program, is a document that was furnished to counsel by the attorney for the plaintiff, and was also furnished to the Court as an attachment to the plaintiff's opposition to the defendant WMATA's motion for summary judgment.

I also note that Defendant's WMATA Exhibit No. 4, which is the Ball-Healy-Granite Contract, is a document that was furnished to counsel by the attorney for the plaintiff, and was also furnished to the Court as an attachment to the plaintiff's opposition to the defendant WMATA's motion for summary judgment.

[6] THEREUPON, DELMER ISON, a witness, was called for examination by counsel for the plaintiff, and after having been first duly sworn by the notary public, was examined and testified as follows:

EXAMINATION BY COUNSEL FOR THE
PLAINTIFF

BY MR. MULRONEY:

Q Would you state your full name, sir?

A Delmer Ison.

Q And your home address?

A 5241 Yorktown Boulevard, Arlington, Virginia
22207.

Q And your business address?

A 600 5th Street, Washington, D.C. 20001.

Q By whom are you employed?

A By the Washington Metropolitan Area Transit Authority.

Q In what capacity?

A I am secretary, and also I am acting director of claims.

Q How long have you been secretary of the Authority?

A Since 1967.

Q Since 1967 have you held any other positions [7] with the Authority other than secretary and acting director of claims?

A No, no.

Q Prior to 1967 by whom were you employed and in what capacity?

A I was employed as the executive director of the Washington Metropolitan Area Transit Commission.

Q How did you come to be appointed as secretary of the Authority?

A I was appointed by the board of directors.

Q What are your duties as secretary of the Authority?

A I serve as secretary to the board, and so I am in charge of the—at the present time I am in charge of the Authority's insurance program. Could I say one thing for the record? At the outset—I don't know why I forgot this—I was secretary/treasurer to the Authority from 1967. I would say about, oh, two years ago—I don't have the specific date—I, through a reorganization—the treasurer functions were transferred over to the controller's office.

Q As treasurer, what were your functions up until two years ago?

A I was in charge of the revenue collection for the [8] Authority, investments for the Authority, the normal treasurer functions of the Authority.

Q Were you involved in the payment of contractors involved in the construction of the subway project?

A I was not. Let's put it this way: checks were issued through my office, through the treasurer's office, to the contractors.

Q Who handled that function?

A That function was primarily handled by Pat Sestito, who was the assistant treasurer.

Q Mr. Ison, I want to show you a document marked as Plaintiff's Exhibit 1 and also Defendant's Exhibit No. 9 and ask if you can identify that document.

A Yes, I can.

Q What is it?

A That's an affidavit by Mr. Delmer Ison, me.

Q Do you recall preparing and signing this affidavit?

A I recall signing the affidavit, yes.

Q Do you recall preparing it?

A I did not prepare the affidavit. It was prepared for me.

Q Did you review the accuracy of the statements [9] contained in the affidavit?

A Yes. We reviewed the affidavit very carefully, as I would always do when I attach my name to an affidavit.

Q At the time you signed this affidavit were you aware that Mr. Wilmes was employed by the joint ventures of Ball-Healy-Granite on the A-6b project Fruin and Colnon on the A-11b project?

A I am not sure about the latter project. I had seen a lot of the litigation involved in this case. Name the last contractor.

Q Fruin and Colnon in Bethesda Station A-11b.

A Well, I am not aware of that one.

Q You were aware that he was employed by Ball-Healy-Granite?

A Yes.

Q I would like you to review statement No. 3 and tell me—elaborate the best you can—what you mean by that.

A I mean that—let me go—the compact created and gave to WMATA the contractual duty to build this 101-mile subway system.

We had several approaches we could take at the time. We could have hired our own crews. We could have maybe [10] selected one contractor to do the whole thing.

What we did do is we elected to split this 101 mile up in sections and subcontract it out to numerous contractors to build the system.

Q I am going to show you a document marked as Plaintiff's Exhibit No. 2 and ask you if you can identify that document.

A Just by looking at it, it apparently is the contract that we entered into with Ball-Healy and Granite as subcontractors to build a section of the WMATA system.

Q Did you sign that contract? It would be on the second or third page.

A I see where I attested to the name on the contract.

Q Do you have a recollection of signing this contract?

A No, I do not.

Q Did you review this contract before signing the affidavit in this case on August 19, 1982?

A My role in signing it—the purpose of my signature on the contract is to attest to the signature of the contracting officer.

MR. COHEN: So you [sic] answer is "no"?

THE WITNESS: No, no.

[11] BY MR. MULRONEY: (resumed)

Q I want to make sure you understood the question.

A Okay.

Q Did you in fact review this exhibit before you signed this affidavit on August 19, 1982.

A No.

Q Are you familiar with this type of construction contract?

A In a general sort of way.

Q Can you describe your familiarity?

A I am familiar with the fact that WMATA subcontracts the construction of a system to numerous subcontractors, and, of course, in attesting to these contracts, I am familiar generally with the format and so forth.

Q Mr. Ison, again asking you to go back to paragraph No. 3, what's your understanding of what a general contractor is?

A Well, I think a general contractor has a contractual duty to construct a project through numerous—by the use of numerous subcontractors.

In fact, I like the—in relating it to WMATA—I like the statement that I see in a case by Judge Green where [12] she says that WMATA is in the position of overall general contractor for subway construction in the Washington, D.C. area with responsibility of supervising numerous consultants, general contractors, and subcontractors.

. . . .

[13] Q In the context of a construction contract, what is a contract?

A Well, I think in the context of WMATA—and I might say that this is, I guess, the first time I have ever been involved with an agency that's involved in construction—a contract is document which, I guess, furnishes guidelines and controls of construction under that contract, if you are talking about a document.

Q Let me just ask you, is a contractor a party who enters into the contract to actually perform the construction work?

A Well, say that again.

Q I said, is the contractor the party to the construction contract that contracts to actually perform the work for a sum of money?

MR. COHEN: I don't mean to interrupt you, but let me just note—if you are going to go this way—a continuing line of objection to hypothetical situations, and an objection to the specificity of that question which doesn't assume whether it is the whole project or a portion of the [14] project, but he can answer if he can.

THE WITNESS: Well, again referring to WMATA, certainly it takes two people to contract, and I view WMATA as a general contractor who contracts with sub-

contractors to build a specific section of the Metro rail system.

BY MR. MULRONEY: (resumed)

Q Let's come back to the Ball-Healy-Granite contract for just a second. Prior to the signing of this contract, are you aware of the procedure for the preparation of the plans, the design, and the preparations of the specifications, and the bidding that all go on prior to the actual award of the contract?

A I think that question can best be answered by the contracting officer, who is the contracting officer of the office of design and construction. I do know that it is one of Metro's contractual duties to plan, design, and construct, and even operate the system. So I know there is a program there calling for planning, designing, constructing, and operation, in that order.

That is out of my area of responsibility in the Authority to do all that or even to be familiar with that.

Q Have you ever reviewed an invitation for the bid [15] of a project?

A Let me put it this way: Even in my area of responsibility, what you call INB, invitation of bids, I have reviewed some of those. I can't recall any specific contract that I reviewed in the construction area.

Q Let's take a look at the cover sheet of Exhibit No. 2. This is a contract for construction of three Metro stations, as I understand it: Cleveland Park, Van Ness Station, and Zoo Park Station; is that right?

A Yes, I see that on the front of it.

Q And the section number is called A-6b?

A Yes.

Q At the time that this contract was awarded what ownership rights did WMATA have in the properties upon which these excavations were to be built?

MR. COHEN: Well, let me object to the predicate for your question, which assumes that Ball-Healy and Granite did excavation work. There has been no testi-

mony that they were to construct the whole station nor is there any testimony that they were to do specifically excavation work. You can certainly clarify that with the witness.

BY MR. MULRONEY: (resumed)

[16] Q You can answer the question.

A Well, I was going to say this contract had another prior contract under which the tunnels were bored for the entire three stations. So the only work that this contractor did for Section 1AB—or whatever it is—A-6b, was to construct the constructional part of the three stations.

Q The question was: At the time this contract was awarded what rights did the Authority have in the locations in terms of ownership where the project was to be built?

A Well, in terms of ownership, we WMATA, has a right to acquire real estate for the purpose of building the station, the three stations, but that's not to say that WMATA is actually the owner of the finished product. WMATA is the contractor for the three jurisdictions and the federal government to build this system. We are not the owners of this system.

Q That's not what I asked you. At the locations where these stations were to be built—

A Yes.

Q —did the Authority have ownership rights in the property?

A WMATA had to—

[17] MR. COHEN: Hold it. I think he answered the question in the way that he can. As I understand his answer, what he is saying is WMATA acquired ownership rights in these stations in order to construct it. WMATA does not own it because it is owned by Maryland, Virginia, and the District of Columbia and the federal government.

Now, that's the kind of ownership he is describing, and I don't think he can change that. You can ask him to clarify it, but I think he has answered the ownership issue.

BY MR. MULRONEY: (resumed)

Q The WMATA compact gives the Authority itself the right to initiate condemnation proceedings, doesn't it?

A Yes.

Q Is it fair to say that prior to the issuance of the invitation to bid WMATA has completed its condemnation proceedings and has acquired title to the property where the construction is going to take place?

A Let me answer it this way: WMATA has to have possession of that property in order for the contractor—we have to give the contractor a right of entry to that property to build the station, but this does not mean that WMATA remains the owner of the finished product.

[18] Q In whose name is the condemnation proceeding initiated, if you know?

A It's in the name of the Authority.

Q At the completion of the proceeding what legal entity holds title to the property in question?

A The Authority—for purposes of naming a contractor to continue the construction—retains title to that property during construction.

Q On Exhibit No. 2 you testified in the affidavit and here today that Ball-Healy-Granite was a subcontractor of the Authority?

A Yes.

Q If you look at the front page of this construction contract, you see that Ball-Healy and Granite is referred to as the contractor; is that right?

A I see the word "contract" at the top of the page.

Q Who drafted this agreement?

A I don't know.

Q Was it the Authority who drafted the construction contract?

A I would assume it was, but I don't know.

. . . .

[19] Q Prior to coming here today have you reviewed this contract?

A I have not reviewed this contract as such, no.

Q Can you tell me what contract documents you have reviewed?

A I have not reviewed any contract documents. I have ascertained the number of subcontracts that were associated with the final product in building these three stations.

In other words, I ascertained the number of [20] functional contracts who report directly to the assistant general manager for design and construction in completing this section of the system.

Q To summarize where we have come so far, it is your testimony that in effect the WMATA compact itself makes the Authority a general contractor; is that correct?

A That is the way I interpret the compact.

MR. COHEN: I think he said a little bit more for the record, because they have the duty, he said, to construct a 101 mile system, and they can do it a number of ways, and they elected to subcontract it out to numerous subcontractors rather than forming their own construction company. That's my understanding of his testimony.

THE WITNESS: That's right.

BY MR. MULRONEY: (resumed)

Q Did the Authority prepare the specifications for the A-6b project?

A I assume it did.

Q At some point the joint venture, Ball-Healy and Granite, was awarded this contract; is that correct?

A I call it a subcontract in my terminology, yes.

Q This contract is for, as I understand it—and [21] correct me if I am wrong—the totality of the construction work that is going to be done on this entire project?

A No.

Q It is not?

A No.

Q All right, correct me.

A All right.

MR. COHEN: Excuse me. Just in fairness to you, Mr. Mulroney, he is referring to Defendant's Exhibit No. 2, of which I didn't provide you with a copy.

Do you have an extra copy of this?

THE WITNESS: Yes.

When a contract to a subcontractor is awarded—and I will relate it specifically to the 1A0062 section of the system—there is a contract awarded for soil testing.

BY MR. MULRONEY: (resumed)

Q Let's take them one at a time. The contract for soil testing, in relation to the date that this contract was entered into, when was the contract for soil testing entered into?

A I don't know. I ascertained in this contract precisely what subcontracts were awarded in order to complete [22] this entire section of the system.

Q Let me ask you one more question before we proceed. Would you agree with me that there is a very big difference between contracts entered into by the Authority for purposes of planning and designing the specifications and the contracts entered into for actual performance of the construction work?

MR. COHEN: I will object unless you can tell me what you mean by "difference." In money, in performance standards and safety requirements? I mean, I don't understand the question.

The witness can answer if he understands it, but I would like to know what you mean.

BY MR. MULRONEY: (resumed)

Q Do you understand the question?

A Well, let me say this—maybe I don't—but I don't like to compare the differences in these various contracts, but I can say this, that every single one of the subcontracts was a vital part of building these three stations in the system.

* * *

[23] Q Second on the list says "tunnels." What is meant by that?

A A separate, independent subcontract was awarded to—and I don't know the name of the firm—to bore the tunnels for these three stations.

Q Well, isn't it a fact that the A-6a contract to which you are referring was a separate project section awarded to the contractor, Morrison-Knudsen and Associates, [24] several years before the Ball-Healy contract was entered into with the Authority?

A This—

MR. COHEN: Excuse me a minute, Del. For purposes of the record you made a reference—his reference here and on the exhibit is Section 1A0062. Are we talking about the same section? You said A-6a.

BY MR. MULRONEY: (resumed)

Q For purposes of elaboration, the tunnel boring machine had already dug the tunnel, and A-6b was merely the excavation of the three stations over and around the tubes that had already been bored?

A Let me put it this way: We've got our system broken down into sections. I think this is one of the largest sections in the system. Normally a section will only encompass one station. But as far as this particular project in the system is concerned, we look at the jobs being performed by these subcontractors as being part of that overall project to develop that section of the system. In other words, then the work they do is all considered to be one project as far as WMATA is concerned.

But all thees contracts were separate entities [25] among themselves in that each subcontractor had to report to the contracting officer for the Authority who was the assistant general manager of the section of the office of design and construction.

Q With regard to what you just indicated are tunnels, do you specifically know what that refers to?

A Yes.

Q What does it refer to?

A This is a separate firm—a separate firm was contracted with to bore the tunnels prior to the next subcontract, which is the work performed by Ball-Healy and Granite.

Q Do you recall that the firm of Morrison-Knudsen and Associates was the firm that did that work?

A I think I am aware of that only because of my general familiarity with the Authority. It is again out of my area of responsibility; but just having been exposed to the Authority as long as I have, I am aware of that.

Q In fact, didn't that contractor sign a contract essentially identical to the one that's been marked as Exhibit No. 2 here?

A Yes, I think I indicated that each one of these [26] documents represent separate subcontracts to complete construction of this section of the system.

Q Let's go down the list: architectural and engineering firm for each station.

A Yes.

Q What are you referring to there?

A I am not saying necessarily all in complete order, but the Authority selects a separate, what we call, A&E firm, to design each station or each part of the system. That's why in this case we had a separate—it is a separate contract, maybe the same firm, but I don't think it is. We have a separate A&E firm to design each station.

Q Essentially these contracts deal with, as I understand it, the preparation of the specifications and perhaps work change orders, things like that; is that right?

A As I understand it, the A&E firm designs the station; and the contractor who is going to perform the work under that will observe the A&E's firms specifications and plans for that station. That's a blueprint for them to complete their work.

Q Those contractors don't actually do any construction work, do they?

[27] A The A&E firms do not.

Q On Woodley Zoo Park, it says "finish." What does that mean?

A After the structural contract is completed, the ceilings, you might say, the platforms, the heavy structural work is completed. Then we contract separately with a firm to come in and finish off the station, put the tile, the finish work.

Again, John Egbert could tell you what goes into a finish contract.

Q The same thing for Cleveland Park and Van Ness; is that right?

A Yes, that's right.

Q Automatic train control, what does that refer to?

A Automatic train control, all of our trains are operated by what we call automatic train control. We have a separate control room. Each station must be equipped to tie in with the automatic train control, which is in the Authority's headquarters at 600 5th Street.

Again, what is involved in installing the necessary gadgets in order to enable the automatic train control center to communicate with each station, that's out of my field, but [28] basically that's what it is. Each station has to be equipped to communicate with the automatic train control center at the headquarters.

Q Well, the automatic train control, presumably the Authority would have already taken possession of the sites following completion of the contract work by Ball-Healy-Granite, wouldn't they, before that could come into effect?

A I am not—

MR. COHEN: I am sorry—I understand the question.

THE WITNESS: I am not sure I do.

BY MR. MULRONEY: (resumed)

Q At what stage of the construction work does the contract work for automatic train control come into effect?

A See, I am really not qualified to answer that question. I don't know whether it is—some of it may be done during the structural stage in order to put some of the wiring in. I don't know that question, at what stage.

Q Why don't you go down the rest of the list and tell me what's involved in those?

A Communications, of course, is what the word implies. Each train is equipped with radios, and it is a communication system which enables the train operators to talk back to [29] central control. The communications, of course, runs through each station.

The automatic fare collection is the automatic fare collection equipment that's manufactured in San Diego and installed in each station. Of course, this must be timed in a way to have the equipment in the station to enable fare collection at the time the station is opened.

The trackwork is laying the track on which the trains must operate.

The escalators enable people to come in and out of the stations. The elevators are primarily for the handicap to get into and out of the stations. By the way, these are all separate subcontracts.

The kiosks are the locations where the station attendants reside and pass out information to the public.

The next is substation equipment. That should really be procurement of substation equipment. That's a separate contract, and then we have a separate contract for the installation of that equipment after it has been procured.

The graphics are the signage in the system to enable the passengers—to tell the passengers which train to get on, and so forth, in order to get to where they are [30] going.

Landscaping is to repair any damage to the surface of the land in and around the station as a result of the construction activities.

The ancillary construction contract is really the last contract that is awarded to put a particular station or stations ready for operation. It is kind of a cleanup thing, where there may be leaks or cracks, little things left undone. It puts the facility in final shape for operation.

The four consultant contracts—of course, the general engineering consultant is the Deleuw Cather firm that at the very outset of the project are what we call “engineers of project.” The same with the general architectural consultant, who studies and recommends the design of stations, the broad general design of stations and their system.

The general construction consultant, Bechtel, they inspect the construction.

Loss control consultant is actually what I call the safety inspector primarily.

Q As I understand your testimony, you are in effect saying that any contractor to whom Metro awards a contract is in your opinion a subcontractor?

[31] A Yes.

Q Now, with regard to most of these things you have mentioned here, escalator, elevators, kiosks, trackwork, do you have any knowledge of whether these contracts are entered into before or after the Authority takes possession of the job site upon completion of the work by the joint venture Ball-Healy-Granite?

A I do not.

Q With regard to your contracts with designers, architects, engineers, landscaping, planning and designing, engineering, aren't all these contracts—don't all these

contracts involve the planning and specification work on the contract as opposed to the actual construction work of the project?

MR. COHEN: Let me object here unless you define "construction." I don't know much about construction, but I would like a definition of it, because it is my understanding that when you build a building and you hire an electrician, the work that he does is part of construction. When you landscape the ground, the work he does is part of the construction package, because you are putting something into shape.

[32] So if you could define construction, I think I would understand what you are getting at and he could respond.

BY MR. MULRONEY: (resumed)

Q It is my understanding that the construction work is defined in the contracts as "the work"; is that your understanding as well?

A Will you name again the firms you mentioned here? Did you name anything other than the four consultants at the bottom?

Q Well—

MR. COHEN: We will stipulate that each contract that has been let with each of these individuals contains the title, "the work," and the work that is contained is what they are supposed to perform for the Authority. Ball-Healy-Granite was supposed to do the structural. The tunneling people were supposed to do the tunneling. The landscaping people were supposed to do the landscaping. That is the work that they have been sub-contracted to do. We will stipulate to that.

BY MR. MULRONEY: (resumed)

Q With regard to the consultants, general engineering consultant, general architectural consultant, general construction consultant, the loss control consultant, do any of these [33] consultants who have entered into con-

tracts with the Authority perform the actual construction work?

A Not in my definition.

Q What's your definition?

A My definition is that the word "consultant," they plan, engineer, supervise, and so forth. I am talking about the general construction consultant.

Q Let's come back for a second to the construction contract, Exhibit No. 2, page 1, the contract by its own terms lists Ball-Healy-Granite as the contractor for the A-6b project, and the Washington Metropolitan Area Transit Authority is referred to as Washington Metropolitan Area Transit Authority; correct?

A Yes.

Q As you said earlier, you attested to Mr. Dodge's signature on this contract? Is that what you testified to?

A Yes.

Q To the best of your understanding, does the award of this contract to Ball-Healy-Granite make Ball-Healy-Granite the prime contractor on the A-6b project?

MR. COHEN: I am going to object unless you define "prime contractor." I don't know—

[34] MR. MULRONEY: It is defined in the coordinated safety program and reporting procedures manual.

THE WITNESS: You know, there is a lot of different, I guess, ways to define a contractor, subcontractor, prime contractor, general contractor, but it is my understanding and my testimony that regardless of what the label in these documents say that Ball-Healy and Granite, the joint venture, is a subcontractor to WMATA.

BY MR. MULRONEY: (resumed)

Q The question was, is Ball-Healy-Granite the prime contractor as defined in the coordinated safety program and reporting procedures manual, to your understanding?

MR. COHEN: Let me object and say that whatever the definition is it obviously speaks for itself. I think he has answered the question in terms of prime contractor,

and in his opinion Ball-Healy and Granite is a subcontractor.

Now, obviously we have to live with the documents. We are willing to stipulate that they are the contractor to perform the structural work along with many other contractors to do other things. If you want to say, are they the prime contractor to perform the structural work, I will say they are not only the prime contractor in the stipulation, but the only [35] contractor.

BY MR. MULRONEY: (resumed)

Q Isn't the Ball-Healy and Granite on signing this contract charged with the contractual obligation to actually perform all of the construction work for that project?

MR. COHEN: I am going to object. That hasn't been his testimony.

THE WITNESS: No. I am going to answer that no.

BY MR. MULRONEY: (resumed)

Q As set forth in the specifications in the contract.

A If you stated before the particular duties outlined in this document, I would say yes, but not to construct the entire project, no.

Q In terms of Ball-Healy-Granite's responsibility, Ball-Healy-Granite in turn subcontracted out a great deal of the construction work as presented in this contract to other subcontractors; is that correct?

A I am not familiar with that. I assume they did.

Q You are not familiar with that?

A No.

Q What's your understanding of the meaning of the word "subcontract" and "subcontractors"?

[36] A I think it is work performed for another contractor above it. We use the phrase at the Authority "subcontractors at all tiers." I understand—and I am not familiar with any specific contract—that there can be several tiers of subcontractors under a single contract.

• • • •

Q Well, in your affidavit you testified that Ball-Healy-
[37] Granite is a subcontractor?

A Yes.

Q Is it your understanding that under the contract, A-6b contract, Ball-Healy-Granite has the authority to sub out the work subject to the Authority's approval of the subcontractor?

A That's my understanding, but I have no specific knowledge as to what they did in this contract.

Q Do you have any understanding as to whether there is any privity of contract between the Authority and Ball-Healy-Granite, subcontractors, on the A-6b project?

MR. COHEN: Let me object, because that calls for a legal conclusion, privity of contract, but I will indicate that we are willing to stipulate that whatever the contract contains in that vein is what actually happened, and the contract speaks to the fact that the subcontractors hired by the first subcontractor will have no relationship to the Authority.

We are willing to stipulate to the whole contract, because obviously we signed it, and it is in black and white, but I think this witness is not in a position to answer a legal question like, is there privity of contract. He is not here [38] in a legal capacity.

BY MR. MULRONEY: (resumed)

Q Is your understanding that WMATA has no contractual relationship with Ball-Healy-Granite's subcontractors on the A-6b project?

A It is my understanding that a subcontractor who contracts with another subcontractor has complete control over that company, except the Authority has to approve that subcontractor.

. . . .

[39] Q Let's come back to your understanding of the word "subcontract." Your testimony is that to your understanding subcontractor is any contractor who under-

takes to perform contractual duties for another contractor; is that correct?

MR. COHEN: Let me object, because we are getting out of context with whether you are talking about Metro or you are talking about a general definition of subcontractor. I think I will object, and I think he already indicated he can't answer the general definition.

MR. MULRONEY: Well, these words mean something. [40] You can't just define terms to suit your own purposes. In the construction trade the words mean something, and this is what I am getting at. I think I am entitled to ask his understanding and determine whether it comports with the general meaning of the words in the construction trades.

MR. COHEN: I guess my only objection is that he has given his definition of a subcontractor as being one who [has] a duty that a contractor has parcelled out. He is saying Ball-Healy and Granite has specific structural duties to perform, a piece of a larger project, and he then considers WMATA has the whole duty to perform the construction. His definition is a person with a discrete portion or a little portion to perform is WMATA's sub.

Now, you may disagree with that. The books may disagree with that, but I think that is his testimony, and it is a legal issue for a court to decide based on common and accepted practices whether this is correct or not, but I think he has already answered the question, is what I am saying.

You certainly, Mr. Mulroney, can ask it again if you think that it hasn't been asked and answered.

BY MR. MULRONEY: (resumed)

Q Do you have an understanding of what the word [41] "subcontract" means in the construction industry?

A I thought Mr. Cohen phrased it very well as far as I am concerned. It certainly implies that it is a small part of a much larger contract.

Q What contract—in what context is the word “sub-contractor” used to your understanding?

A It is used to denote that there are several, more than one function, under a larger contract.

* * *

[43] Q Do you have any personal knowledge about how the joint venture, Ball-Healy-Granite, was awarded the A-6b contract?

A No, except generally the large construction contracts are awarded based on competitive bidding.

Q Are you aware that the term “general contractor” in the context of construction contract generally refers to that contractor who contractually controls the duties of the subcontractors on the job site?

A As I have said, I have testified that the compact created WMATA as a general contractor with contractual duties to subcontract with the authority—contractual duties to [44] build a system, and we elected to do it through subcontractors.

Q Another way of saying that is that you elected to award contracts involving specific sections of the subway system; is that correct?

A Well, in the terminology you use “contracts.” I say “subcontracts.”

Q It is your understanding that the Authority had the right if it wanted to utilize its own personnel on a job site to construct a contract; is that correct?

A I believe under the compact we would have the right to form our own construction crew.

Q Is it also your understanding that the Authority, if it chose to, could elect to retain the right to subcontract out work on each project itself rather than to leave that to the contractor awarded the contract for a specific section?

A Let's relate it to the case here. Are you saying that we would have the right to select subcontracts under Ball-Healy and Granite?

Q Not under that specific contract, but what I am asking you is, as I understand your testimony, you say you elected to do business this way?

A Yes.

[45] Q And you could have done it another way? You could have utilized your own crews to build the subway system; is that correct?

A I believe that's correct.

Q Is it also fair to say that you could have elected to retain contractual control over the subcontractors on a specific project?

MR. COHEN: Let me object. I think I stipulated—and I think the contracts will speak to that—they do retain contractual control over the subs via approval, via termination, and I think that testimony is in the record.

MR. MULRONEY: You are using the word "control" in a different sense. You are talking about supervisory control. I am talking about direct everyday right to control the work activities of the subcontractor.

MR. COHEN: I think this witness has testified that Mr. Egbert is the one that will tell you specifically what is done. The documents that are in evidence now clearly give the Authority the right to exercise total control over the project, and so does the compact. I think that's what he is saying.

BY MR. MULRONEY: (resumed)

[46] Q Let me ask the question again, because I do think I am entitled to have it answered: Is it your understanding that if WMATA elected to do so the very next project, subway project that was designed, could be constructed, built, with WMATA personnel?

MR. COHEN: Let me object to that on the grounds that it is hypothetical. Certainly you can answer it. I think he has already answered it.

THE WITNESS: I think it could.

BY MR. MULRONEY: (resumed)

Q And that it could also retain the right to subcontract out the work on each site?

A That's really what we do, subcontract out. We subcontracted out in this case, in this section. I think it is 25 contracts involved here.

Q Let me ask you, that is not a list of subcontractors, is it?

A It is a list of subcontractors to complete Section 1A0062.

MR. COHEN: By his definition, and his definition is WMATA subcontracts out discreet portions of the system and the sites. By his definition the contracting out of a discreet [47] portion under the overall supervision and control of WMATA makes WMATA the general, and the person who has the discreet portion a sub. And as I say again, that's the fact. Now, legally I think it is for a Court to determine, and I don't think he can determine it.

BY MR. MULRONEY: (resumed)

Q A-6b project was a large project, wasn't it?

A Yes, very large.

Q What was the contract price on that?

A I don't know.

Q It is on the first page of the document.

MR. COHEN: Well, let me object because that's only one portion of the project. In order for him to give you the total contract price, he has to add up all of those particular contracts, plus the consulting fees to determine the cost of the project.

BY MR. MULRONEY: (resumed)

Q Mr. Ison, this construction work that's mentioned in this contract, the contract price is \$70,000,933 and change; is that right?

A Yes.

.

[48] Q Well, isn't it a fact that Ball-Healy-Granite has control over the work activities on this contract?

A No.

Q It is not a fact?

A No.

Q Who has control over the work duties?

A Well, I know certainly the general construction consultant has a lot of control over it. The loss control consultants have a lot of control over it, and I assume Mr. Egbert could respond better than I. I assume that there are other controls. Certainly he exercised a lot of control over [49] this contract.

Q Without referring to the contract, what are you referring to? What experience are you talking about?

A Well, I will just give you one—and again I am not really the one to testify, but certainly the contracting officer has a right to shut this job down any time he feels that within his authority he needs to.

Q To come back to this contract, you are saying WMATA is the general contractor for the entire WMATA project?

A Yes.

Q Has WMATA entered into any specific construction contracts with either the jurisdictions of the District of Columbia, Maryland, or Virginia?

MR. COHEN: Let me object. I think he has answered that by saying that the compact is the contract with the jurisdictions. Now, are you saying is there anything in addition to that?

MR. MULRONEY: That's right.

MR. COHEN: You can certainly answer that, if you know.

THE WITNESS: We have entered into, I am sure, the service contracts with the jurisdictions.

[50] BY MR. MULRONEY: (resumed)

Q You are talking about construction contracts?

A I am not sure, and I can't recall any right off.

Q Do you have any personal knowledge as to why the Authority is not referred to as the general contractor in these documents?

A I have no knowledge of that.

Q Do you have any knowledge as to why the joint venture, Ball-Healy-Granite, is referred to as a contractor as opposed to a subcontractor?

A No.

Q Do you have any knowledge as to why WMATA chose to award construction contracts such as the one in front of you now as opposed to utilizing its own personnel to construct the system?

A No. I think that's out of my area.

Q To your own knowledge has the entire system been built the way that is reflected in this contract?

A I think the method in which this contract was awarded is certainly a pattern, to my knowledge, of how we go about constructing the entire system.

Q Do you have any personal knowledge as to whether [51] WMATA has on any Metro project utilized its own personnel to do the actual construction work?

MR. COHEN: I think here again you got to define "construction." Let me state my objection specifically. The person who actually digs may be classified as doing construction work, but just as equally as important is the person who inspects the project, the person who designs the project, the person who supervises the project from a safety and quality control standpoint.

You are limiting construction work to the person that actually does, as an example, the physical work, and I would submit, and I would be willing to stipulate that whoever the owners of Ball-Healy and Granite are, they have not performed any construction work. It is done basically by people they hire to do labor, so I think you got to define what you mean by "construction work," otherwise it is just not a sensible question, with all due respect.

BY MR. MULRONEY: (resumed)

Q Do you understand what the phrase "construction work" means?

A It certainly—if it is a very narrow interpretation, it is one meaning. But if it is a broad interpretation, [52] such as Mr. Cohen just stated, there are Authority employees that would be involved in construction work.

Q Do you have any personal knowledge of the way the term is utilized in the construction industry?

A No, I don't.

Q Back to a question I never got answered, in your opinion is Ball-Healy-Granite the prime contractor on the A-6b project as defined by the WMATA coordinated safety program and reporting procedure manual?

MR. COHEN: Well, let me object and say it was answered by virtue of the stipulation. We indicated that we are willing to stipulate that whatever the contract documents called Ball-Healy and Granite, they are. His testimony has been that they are basically a sub for a discreet portion, so I think you've got an answer to that. You have two answers: one via stipulation and one via his opinion.

MR. MULRONEY: I still don't have an answer to the question, I don't think.

MR. COHEN: Could you define "prime contractor"? If you mean by "prime," are they the general contractor on the project, I think he has answered that.

MR. MULRONEY: I mean as defined in the WMATA [53] coordinated—

MR. COHEN: All right. Let's turn to that, and let him look at it, and let's see if he can answer it.

BY MR. MULRONEY: (resumed)

Q Let me show you Exhibit No. 4, page 3, I think—

(A) (Witness examines document.)

MR. COHEN: We are willing to stipulate that what the contract says about Ball-Healy and Granite being the

prime contractor in relation to the items mentioned here, which is basically safety and accident prevention, is correct.

BY MR. MULRONEY: (resumed)

Q Is it your opinion that on the A-6b project and with reference to Ball-Healy-Granite subcontractors, that Ball-Healy-Granite is the general contractor for that project?

A I have already answered that. I consider it to be a subcontractor of WMATA.

Q You don't consider them to be the general contractor for that project?

A Not in my broad definition.

Q Just briefly take a look at Exhibit No. 5.

* * *

[54] MR. MULRONEY: This is a schematic diagram from Collier on construction contracts, a 1979 book. It is a diagram from Section 1.2, and it represents the roles of the various entities on complex commercial and/or governmental construction contracts.

* * *

[56] Q Mr. Ison, have you examined the diagram?

A Yes.

Q With reference to the dichotomy drawn between the design contract and the construction contract only.

A Well, WMATA clearly has combined the design work and construction work under the contracting officer authority. The office of design and construction is all included in one.

Q So that you feel that the setup at WMATA is materially different from the situation diagramed here?

A Yes, that is the first obvious difference.

Q Any others that you notice?

A Well, I would certainly—you mean just as dichotomy of the appearance?

Q Just with regard to the dichotomy between the design contract and the construction contract.

MR. COHEN: Well, I don't mean to interfere or cut you short, but it seems to me there is a threshold question that has to be answered here, and that threshold question is, is this in any way representative of the setup that the [57] Authority has utilized because we have their schematic in an exhibit, and it seems to me that whatever is to be made of this, the comparison can be made by the Court as to which is the appropriate way to go.

But I think we are wasting time trying to have this witness compare what this is, which we don't know, versus what WMATA does, but you can certainly inquire.

BY MR. MULRONEY: (resumed)

Q Why don't you answer Mr. Cohen's question?

MR. COHEN: I don't mean to be obstreperous, but I am really trying to make a very, very clear record, and it is really predicated upon the fact that you have alleged that this witness has misrepresented himself, and filed a Rule 60b3 motion.

I also interpret that to mean that combined with 60b3 is fraud, and I want to be very, very careful, since this witness has been accused in a Federal District Court of what I think is fraud and misrepresentation, that we have a very, very clear and nonfussy record, and that's the only reason for the detail and specific objections, but I don't mean to block you, and you certainly can ask him any question you want.

[58] THE WITNESS: Let me say this: As I said before, I am not the one to relate the organizational structure of the office of the Department of Design and Construction for the purposes of this deposition. Mr. Egbert is the contracting officer for the Department of Design and Construction and would be the one who is more knowledgeable and certainly knowledgeable with comparing the Authority with this schematic.

In my opinion if we were to try to substitute WMATA, even at the very top of this chart, I would say that the

owner would be classified as our jurisdictions, because they literally own the system. But beyond that, as to how the office of design and construction would be compared with this, I am not qualified to answer that question.

MR. COHEN: Do you intend, Mr. Mulroney, to introduce your Exhibit No. 5 into the record?

MR. MULRONEY: Yes.

MR. COHEN: Can we then at least for purposes of cross-examination see the book?

MR. HANNY: Off the record.

(Thereupon, an off-the-record discussion occurred, and then the deposition continued as follows:)

[59] MR. MULRONEY: For the time being I will withdraw the exhibit, in the interest of fairness, for the present time until such time as we find the reference book.

.

Q If I could take just a minute, I would just like to go through the general consultants that are contracted [60] by WMATA to do work on the subway system.

The general engineering consultant is DeLeuw Cather and Company?

A Right, yes, sir.

Q What services does that company perform?

A Again I don't want to appear to be evasive, but in order to have a direct answer, Mr. Egbert could give you the better answer, but they are the very first—they do the very first engineering on the job site for the entire system and try to help select where the routes are going to go. It is a very broad general engineering undertaking for the entire system.

Q In the normal course of things would they have performed design engineering work on the A-6b project?

A I don't know.

Q General architectural consultant is Harry Wieson Associates?

A Yes.

Q What service does the architectural consultant perform?

A They perform the architectural work for the system, and certainly they would lay the blueprint, the broad blueprint [61] for the makeup of the stations, the very broad pattern of how the stations will be later designed and built.

Again, Mr. Egbert would be the one to pinpoint precisely what their role is, but they definitely had a role in this particular contract.

Q The general soils consultant is User, Rutledge and Johnson?

A That name certainly rings a bell.

Q You are not familiar with them?

A At one time. I assume we still have them on board.

Q Do you know who the special designer was for Section A-6b project?

A No, I don't. You mean the special—you mean for each section?

Q Yes.

A No, I do not.

Q Is there a special designer assigned to each individual section?

A That is within the discretion of the contracting officer. Generally that is what we call an A&E firm that comes in and designs each station.

Q Is it fair to say that the consultants I have [62] mentioned performed work that results in the issuance of the contract documents for a specific section?

MR. COHEN: Is that all the—well, if you can answer it.

THE WITNESS: Well, I want to make sure you—

BY MR. MULRONEY: (resumed)

Well, with reference to A-6b, the Ball-Healy-Granite contract.

A Okay.

Q As I understand this, WMATA entered into contracts with these consultants who do a great deal of work and prepare the contract drawings, general provisions, the standards and specifications, special provisions.

A I can't answer that. That would be John Egbert's responsibility.

Q You don't know that?

A I don't know.

MR. COHEN: Also just to clarify the record, that's all spelled out in the exhibit that we put in called "The Department of Design and Construction," which tells you what everybody does.

. . . .

[63] BY MR. MULRONEY: (resumed)

Q. Mr. Ison, also in your affidavit, paragraph 4, you indicate that the subcontractors do not provide workers' compensation insurance for their employees, instead WMATA as the general contractor provides workers' compensation insurance for the employees of its subcontractors.

A Yes.

Q I think we have already established that WMATA has no contractual relationship with the subcontractors of Ball-Healy-Granite on the A-6b project?

MR. COHEN: We have stipulated basically to the fact of what's contained in the contract. However, Mr. Ison's use of the term "subcontractor" is specifically referring to Ball-Healy and Granite and all the tiers of subcontractors.

I think you have to ask him how he defines [64] "subcontractors," because I think he has already defined it, but you are now defining it as subs of Ball-Healy and Granite, and he maybe talking about Ball-Healy and

Granite and their subs. That's all we are saying.

I think there is a semantic difference.

BY MR. MULRONEY: (resumed)

Q Do you understand what we are talking about?

A Yes.

Q Would you explain paragraph 4?

A I am saying that WMATA is providing workers' compensation insurance as a general contractor for its employees and all subcontractors of WMATA down the line at whatever tier, that includes the subcontractors of the subcontractor of the subcontractor.

Q Would you explain for us the difference between Phase I on the Metro system and Phase II from the standpoint of the insurance scheme and the coordinated insurance program?

A Phase I consisted of a series of contracts, and I don't recall how many, under which the various subcontractors provided their own insurance coverage of which we are talking here.

Phase II—did you want me to explain the next [65] phase?

Q I would also like you to explain the time frame. How long did Phase I last?

A Let's see. I believe the coordinated insurance program was instituted about—I think it is—July of '71.

MR. COHEN: I am just letting him look at Defendant's Exhibit No. 3, which talks about the coordinated insurance program, to see if he can locate the time frame for you.

THE WITNESS: It is definitely '71. 7/30/71, as I recall. And the groundbreaking for the Metro system, which commenced Phase I was December 9, 1969, as I recall. I am not saying that we were awarded—a lot of contracts started at that time, but basically it was any work that was performed prior to July 31, 1971, would be under Phase I, and everything behind or beyond July 30, 1971, would be under the coordinated insurance program.

BY MR. MULRONEY: (resumed)

Q To be more exact, wouldn't it be contracts entered into before that time even though the work carried on after 1971 would be under Phase I?

A That's true.

[66] MR. COHEN: When you say: to be more exact, contracts entered into, do you mean—I just want to understand the question. That if a worker was injured on a Phase I contract, are you saying—is the question then that WMATA's comprehensive insurance program would not cover him. I am not sure I understand the question. Is that the question?

MR. MULRONEY: I thought it was fairly clear, but, yes, that is the question.

MR. COHEN: I am going to object on the grounds that that is an issue of law, that this witness clearly is not committed to answer, because under *Liberty Mutual v. Cardillo* in terms of which insurance company bears the brunt, it is clear by virtue of that Supreme Court decision, that it is the employer who is the employer when the injury manifests.

So, therefore, your question is legally not correct. And his answer, obviously, as a layman is not correct according to the Supreme Court.

MR. MULRONEY: I don't think that we understand each other.

BY MR. MULRONEY: (resumed)

Q On contracts entered into prior to July of 1971 [67] did the construction contractor in question continue to carry his own insurance for the life of his construction project?

MR. COHEN: If you know.

THE WITNESS: Well, let me answer it this way, which I do know: The coordinated insurance program, which incepted on July 30, 1971—

Q July what date?

A July 30, 1971.

MR. COHEN: I think I would say approximately.

THE WITNESS: Approximately. It covered the employees of all subcontractors at whatever tier of contracts entered into after that date.

BY MR. MULRONEY: (resumed)

Q Of your own personal knowledge, would you explain Phase II and the coordinated insurance program and the reasons for the inception of that program?

A Well, to commence with, we had a legal obligation to provide insurance coverage for all employees, for all contractors, subcontractors, at whatever tier; we had a legal obligation to provide workers' compensation insurance for these employees, and we were very much aware that going down the road there would be literally—it is hard to say— [68] hundreds of contract employees at subcontractor level up and down the line to be covered by insurance, which WMATA was responsible for taking out.

The primary reason we went to the CIP is because of this legal requirement to provide insurance, because we were well aware of the fly-by-night insurance companies who could cancel out of a given contract without any notice and leave the Authority bare, so we elected to make sure that the public was protected, that every employee was protected on this entire project, to adopt the CIP and put that program into effect, which included all employees on this project.

Q That's the reason for the inception of the program?

A That's the basic reason.

Q Any others?

A There are many as a result of that program which was put in to legally protect the employees. There were other benefits that flowed from it.

It was easier for us to administer a single policy of insurance for which a certificate of insurance was issued to every subcontractor on this job. It was easier for us to keep a record, and we have personal knowledge with

this one [69] policy in effect, that every employee on this project is covered.

In addition, another benefit that emanated from the program was that we were able to effect considerable savings in costs by buying insurance through one large insurance company.

I would say cost savings, ease of administration, which flowed from the primary purpose of legally protecting our employees on this project. One thing we did not want to happen—we were involved in spending a lot of public money and we were very much in the public eye, and we did not want to have a lot of employees—I heard the expression used—become a ward of the jurisdictions.

We wanted to make sure that each employee was fully protected and would be compensated in the event of an injury. That's basically it, why the Authority adopted the coordinated insurance program.

Q So your testimony is that the primary reason was concern over your legal obligation and second is administrative and financial?

A There is no question about that.

MR. COHEN: Also, I think he mentioned something [70] which you may have missed and the reporter may have missed, the fly-by-night insurance companies. I don't think he made that clear.

THE WITNESS: Yes. We were concerned—In other words, the burden is on us to make sure that every employee is protected at all times.

BY MR. MULRONEY: (resumed)

Q What led you to believe you did have that burden?

A The law itself. At the time it was the Longshoremen's Harbor Workers Act under which the Metro project, in D.C. certainly, was subject to. All the employees in D.C. on the project were covered by the Longshoremen Harbor Workers Act.

Of course, the compact itself required us to procure insurance and protect the public.

Q The compact doesn't contain anywhere in it a requirement to cover employees of contractors for workers' compensation, does it?

A It would have to be checked.

MR. COHEN: I think he said "protect the public."

MR. MULRONEY: I understand that there are provisions in there to protect property damage and things of that [71] nature.

MR. COHEN: Well, obviously the compact will speak for itself, but the basic tenet of the compact is to have a transit system built for the benefit of the three jurisdictions which will inure to the benefit of the citizens with the least amount of disruption.

I think his interpretation is employees, even though they are employees of contractors, are probably citizens of these jurisdictions. In order to protect them under the broad mandate of the contract, you use the insurance, but I think his basic tenet, as I understand it, is he had a legal duty.

BY MR. MULRONEY: (resumed)

Q Was this discussed at any meetings, this concern over your legal obligation?

A You mean back at—

Q At that time.

A Oh, yes. Oh, yes. My staff and I were very concerned about a fly-by-night insurance company going out of business and leaving without any notice to us, leaving the contractor and subcontractor, the employee, without any protection, leaving the contractor without any insurance.

[72] **Q** At the time were you a member of any committees that were involved in considering and drafting the coordinated insurance program?

A At the time I was in charge of the insurance program for the Authority. I don't know if I was a member of any committees or any official groups. I was just performing my duty as a staff member of the Authority.

Q Well, are there any records of these meetings concerning the drafting of the coordinated insurance program, to your knowledge?

A I might say this, we certainly gained some experience from the subway system of San Francisco. Several members of our board of directors went out to San Francisco. I went with them. It was to find out firsthand the nature of their program, what they call the wrap-up insurance program.

We certainly gained a lot of experience on techniques on how to put a program together as a result of that trip.

Q To ask the question again, were there any minutes of any meetings or any recorded documents in the possession of the Authority that would involve a discussion of the reasons for adopting the coordinated insurance program?

[73] A I don't know whether we—we certainly had meetings at our board meetings. We have minutes of our board meetings, which I am not immediately familiar. They cover the actions taken by our board in adopting the coordinated insurance program.

Q Were you present at those board meetings?

A Yes.

Q Do you recall discussing the concerns that you testified to here today?

A I don't recall. It has been about 11, 12 years ago.

Q Mechanically how does the contractor become covered under this coordinated insurance program since its inception in July of 1971?

A Basically the policy is written from, I guess, July 30 of 1971 until it is cancelled, which means it is in effect forever. It is an ongoing document that just never expired since its inception.

Any time a contractor comes aboard at any tier, a certificate of insurance is issued to that contractor, certifying that his employees are covered by this policy

of insurance issued by the Lumbermen's Mutual Casualty Company [74] covering all of his employees. It is a very automatic thing.

It remains in effect until that contractor leaves the job site.

Q Now, what coverage is included in this policy?

A Are we talking about the workers' comp policy in this conversation?

Q I am talking about all phases of the policy.

A Well, let's put it this way, the wrap-up includes three basic policies: workers' compensation, general liability, and builders risk. As far as workers' compensation, it specifically covers injuries sustained under the Longshoremen Harbor Workers Act, under the laws of Virginia, under the laws of Maryland and D.C.

Let me correct one thing, I don't believe it mentions specifically the Longshoremen Harbor Workers Act. I think it mentions the Workers' Compensation Act of the District of Columbia, which is and was until recently the Longshoremen Harbor Workers Act.

Q In the invitation to submit bids for a specific contract, does a contractor—the competing contractors, are they instructed in an invitation not to submit any bids including the cost of insurance?

[75] A I am not familiar as to whether they are told that or not. I really don't know. I know that they are told that the Authority will provide workers' compensation and the other types of insurance at its own expense, but I am not sure what the specs say in relation to the company providing insurance.

Q For example, on the Ball-Healy-Granite contract, Exhibit No. 2, mechanically how does Ball-Healy-Granite's subcontractors become insured under this program?

A It is my understanding the mechanics require that any sub who the contracting officer has to approve, that you put on that contract, on approval by the contracting officer, then a certificate of insurance is issued by the insurance company to that sub.

Q The certificate of insurance then is issued by Lumbermen's Mutual Casualty Company by virtue of WMATA's contract with Lumbermen's?

A Well, let me put it this way: The insurance policy that's issued, it makes—it wraps everything up in a ball. That's why it is frequently referred to as wrap-up insurance. It includes WMATA and all contractors on this project.

Q Well, Lumbermen's does not have any, as I understand it, contractual relationship with anybody other than the [76] Authority, does it?

A I am not really sure. This may get into a legal question, but it is my understanding that the contractors have the same relationship with LMC as the Authority does.

They are named on the policy. LMC is required to, I guess, defend that contractor.

MR. COHEN: For clarity of the record, this whole procedure is spelled out in the exhibits, which are the Ball-Healy-Granite contract, as to what the sub Ball-Healy must do, what the sub sub of Ball-Healy must do, how they must report, what their relationship is to the insurance company.

Mr. Ison may not have read that contract recently or at all. We are willing to stipulate that whatever is contained in those documents is an accurate representation of what goes on.

BY MR. MULRONEY: (resumed)

Q With regard to that wrap-up insurance policy, specifically with reference to the workers' compensation portion of it, can you explain the mechanics of how it works?

MR. COHEN: After a claim is filed? I just don't understand you.

BY MR. MULRONEY: (resumed)

[77] Q In terms of how the policy is paid for.

A Basically it is very much like any normal insurance policy that's issued on an annual basis. The insurance premium rates are negotiated at the beginning of each year, and we try to estimate what the total costs of that year of the injuries are going to be for that year in advance.

We negotiate with LMC as to what the total premium would be, and we make the total premium payment in monthly payments to LMC. Then—

Q What occurs—

MR. COHEN: Okay, finish, Del.

THE WITNESS: Obviously we take into consideration—we work very closely with the Department of Design and Construction in order to find out what the construction schedule is so that we will know exactly how many new jobs are coming on line, and so forth, how many new subs will be coming on line, and so forth, so that we can get a handle on the total costs of contemplated injuries on that job or on the jobs, so that we will have some basis for agreeing on a premium.

BY MR. MULRONEY: (resumed)

Q What happens in the event that you estimate low and you ended up paying more money than the loss?

[78] A I might say we have had both situations where we have overestimated and underestimated. If we have underestimated and there are additional costs, we have what we call a contingency insurance fund sitting there to make up any deficits for that year.

Similarly if there is an—if we overestimate, and along in the year we see that the costs are not materializing, then we will agree with LMC to waive a monthly premium in order to bring it more in line with the actual cost.

We have got a fund to pay additional costs, and we have a way of having LMC agree to waive a monthly premium in the event the premiums are excessive.

I might say that they [sic] way we gauge this is we agree that we should keep LMC funded on a continuous basis at a level of 120 percent of the estimated cost of the claims. We have a cushion built in of 20 percent above the actual cost. This is to take care of any emergency loss that might be unusual, sudden emergency loss.

MR. COHEN: For the record, Mr. Mulroney, can you have Mr. Ison define what he means by "cost" and "estimated cost"?

Do you mean claims, Mr. Ison?

[79] THE WITNESS: Estimated cost of the claims, of the workers comp claims.

BY MR. MULRONEY: (resumed)

Q How is LMC paid its profit margin?

A LMC is paid a total fee—right now it is—well, due to the curtailment in construction, I think it has gone down by \$200,000 a year. Up until now it has been a million six per year as a flat fee for their profit. That not only includes their profit, but it includes all their administrative costs and the whole works, the million six.

Q Is it fair to say that in effect this is a form of self insurance?

MR. COHEN: I haven't heard any testimony from the witness that this is a self insurance. I heard about a premium being paid, but you can certainly answer the question.

THE WITNESS: In my opinion this is not a self insurance program. If the Authority went out of business tomorrow and something happened to the money that we have got set aside to pay claims, and for some reason that money was then suddenly not available to pay claims, LMC would be on the line to pay all outstanding losses without question.

So far as LMC is concerned, it is not a self [80] insurance program. As far as the contractor is concerned, it is not a self insured program. They are issued policies

calling for all claims above—well, I started to say above \$1—from \$1 up.

There is no deductible listed in the policy. It says the employees will be paid this workers' compensation from \$1.

Q Assuming in the case of Exhibit 2, Ball-Healy-Granite subcontracts electrical work, and assume that it is Walter Truland Company, and Walter Truland has a workers' comp policy with Aetna, is that other coverage superseded at the time they enter into their contract with Ball-Healy-Granite to work on a Metro site?

A Are you saying is a policy that the Authority has taken out supersedes the other policy?

Q Right.

A I don't know. All I know is that we have issued a policy to protect the Authority. We don't have to rely on any other insurance which may be provided.

Frankly, in the way we operate I am never aware of what other coverage a contractor may have taken out.

MR. MULRONEY: I don't have anything else.

* * *

[81] EXAMINATION BY COUNSEL
FOR THE DEFENDANT

BY MR. COHEN:

Q Mr. Ison, the first thing I would like to ask you about, if I may, is your affidavit, which is Defendant's Exhibit 9, I believe, and Plaintiff's Exhibit 1. The first question is: This is your affidavit, is it not, sir?

A Yes, sir.

Q And you signed this under oath; that is, you were subject to penalties of perjury and you were sworn to tell the truth; is that correct?

A Yes.

Q Did you read over this affidavit very, very carefully before you signed it?

A Yes, sir.

[82] Q When you signed it, am I correct in my understanding that what you represented here is the truth as you know it?

A Yes, sir.

Q Did you intentionally at any time in terms of signing or approving this affidavit misrepresent anything in this affidavit?

A No, sir.

Q Did you at any time attempt in signing this affidavit, or did counsel at any time in showing you and preparing this affidavit, attempt or indicate that this was going to be a fraudulent document, a document used for the purpose of deceiving the Court?

A No, sir.

Q To the best of your understanding and knowledge, everything you mentioned in this affidavit is absolutely true?

A Yes, sir.

Q You were questioned by Mr. Mulroney about paragraph 3 of the affidavit in which you said that WMATA as a general contractor has contracted with private construction companies as subcontractors to build the WMATA subway system; is that true, sir?

[83] A Yes, sir.

Q And in response to one of Mr. Mulroney's questions you mentioned the fact that the compact had that WMATA was created by the compact to construct this system for the three jurisdictions; is that correct?

A Yes, sir.

Q And the three jurisdictions you were referring to are Maryland, Virginia, and the District of Columbia?

A Right, sir.

Q Does this compact and its enabling documents require WMATA to construct a 101-mile system?

A It requires WMATA to construct a system. Its board of directors, pursuant to the WMATA compact mandate, planned, designed and engineered the 101-mile system.

Q Does Ball-Healy and Granite—who you referred to in this case as a subcontractor—have the responsibility to construct the entire Metro system?

A No, sir.

Q Does Ball-Healy and Granite have the responsibility to construct the entire site on its Section A-6b?

A No, sir.

Q Am I correct in my understanding that all Ball-
[84] Healy and Granite has been contracted to do is to do the structural work on A-6b?

A That's correct.

Q After Ball-Healy and Granite finished their work on Section A-6b, could any person in Maryland or Virginia or the District of Columbia ride a subway at that site?

A No, sir.

Q Would it be fair for me to state that that site was not finished at the time that the structural work was finished?

A Right.

Q Would it be fair for me to state that before that site could become operational, that many other contractors had to finish their work?

A Yes, sir.

Q These are contractors, much like Ball-Healy and Granite, who you WMATA subcontracted with to perform a certain function?

A That's correct.

Q Referring you to Plaintiff's Exhibit 2, which lists the subcontractors, as you called them, on the Metro system, would it be—

MR. MULRONEY: I believe that's a defendant's
[85] exhibit.

BY MR. COHEN: (resumed)

Q I'm sorry; Defendant's Exhibit No. 2, which lists the subcontractors on the Metro system, would it be fair for me to state that each subcontractor listed—and I

count one, two, three, four, five, six, seven, eight, nine, ten, eleven, twelve, thirteen, fourteen, fifteen, sixteen, seventeen, eighteen, nineteen, approximately. I am not holding you to the number—was an indispensable part to the preparation of that site?

A Yes, sir. Let me explain one thing, this information was provided me by a responsible official in the office of design and construction, and I can certainly say that each one of these contracts was an essential part to this whole project.

Q Before construction can begin, the Authority subcontracts in the same contractual form as they did with Ball-Healy and Granite to have the soil tested; is that correct?

A Yes, sir.

Q Now, I don't know the total sequence—

A Ask that question again. Let me make sure we get this correct.

[86] Q Does the Authority before Ball-Healy and Granite comes on to the site subcontract to have the soil tested?

A Yes.

Q Before the structural work that Ball-Healy and Granite did in this contract can be done, is it necessary and did the Authority subcontract to have tunnels done?

A Yes, sir.

Q Now, the Ball-Healy and Granite subcontract calls for a payment of \$70 million for building the structure of three stations; is that correct?

A That's correct.

Q Did they do anything else on the job to your knowledge?

A To my knowledge, no.

Q Did they do any tunneling?

A No, sir.

Q Now, you have no idea how much the subcontract for tunneling was, do you, sir?

A No, sir.

Q You have no idea how much of the \$70 million that was paid Ball-Healy-Granite related to the total cost of the development of this site, do you?

[87] A No, sir.

MR. MULRONEY: Objection. I am going to object on the basis that it is plainly in the records that I already submitted to you that the tunneling work was a separate contract and involved a totally separate amount of money.

MR. COHEN: That's what I said. Excuse me, Mr. Mulroney. I don't mean to mislead you.

BY MR. COHEN: (resumed)

Q The tunneling contract was a separate contract with a separate sub—it was a separate contract with a separate company to do tunneling; is that correct?

A Yes, sir.

Q The structural contract was a separate contract with a separate company named Ball-Healy and Granite to do structure work; is that correct?

A Yes, sir.

Q The finish work involved three separate contracts with three separate companies to do finishing work; is that correct?

A That is the information that was furnished to me by the office of design and construction.

Q The finish work involved finishing off the station [88] or what does that involve, sir, can you tell us?

A That generally is the work involved in getting the station ready for use by passengers.

Q The tunneling work is basically work in which a construction company would come in and remove dirt, et cetera, and build, shore-up, and do what we normally think of being done in making a tunnel?

A Yes, sir.

Q And Ball-Healy and Granite can't put up the station structure until the tunneling is done?

A That's correct.

Q In terms of supervision and control, does the Department of Design and Construction of Metro supervise, control, and monitor the soil testing contract to your knowledge?

A Yes, sir.

Q Does the Department of Design and Construction supervise, monitor, and control the tunneling contract?

A Yes, sir.

Q Does the Department of Design and Construction supervise, monitor, and control the station structure contract?

A Yes, sir.

[89] Q Or the Ball-Healy contract, as we have been referring to it?

A Yes.

Q Would it be fair for me to state that in terms of Defendant's Exhibit 2 the Department of Design and Construction performed all of the functions outlined here in terms of supervision, monitoring, and control of each sub-contract that's been let at this site?

A Yes, sir.

Q To your knowledge, is the Department of Design and Construction considered your general contracting arm?

A Yes.

Q And does the Department of Design and Construction, as we leave this site, A-6b, and move to other sites, do they in essence perform the same functions and monitor, control, and supervise the contracts at each site at which this system is being built?

A Basically that's true. Of course, in some station locations there may not be tunnels involved. But assuming that everything is present, why that's true.

Q Is it your position when you call WMATA the general contractor, that you are saying that each person who gets [90] a contract from WMATA, even though they might be called contractor, in essence only assigned a

small portion of the site work, and that the overall responsibility in supervision and control of that site and its varying contractors rests with WMATA?

A Yes, sir.

Q Is it further your testimony as to why they are a general contractor, that Ball-Healy and Granite has no responsibility for doing anything on this site or any other site—well, now let us talk about this site on this particular site in which Mr. Wilmes was injured—other than the structural construction?

A That's my information.

Q If that site is never prepared, if the tunneling is messed up, if the escalators don't work, if the finishing is done improperly, Ball-Healy and Granite has no responsibility for that?

A That's my understanding.

Q The only thing that Ball-Healy and Granite is responsible for in terms of this A-6b site is to do the station structure under the controlled supervision and direction of WMATA?

[91] A Yes, sir.

Q You were asked a question, and you indicated that in your opinion under the compact WMATA could put together its own construction company to do the various things that had been outlined in Defendant's Exhibit No. 2; is that correct?

A Yes, sir.

Q My question to you, sir, is: Am I correct in assuming that one of the reasons that they did not in essence create its own construction company is because after the system was constructed, what would you do with it? Was that ever considered?

A I don't know, Mr. Cohen, why they didn't do that.

Q But there would be a problem, am I correct, that after the station is constructed, you would then have a construction company with no mission?

A That's true.

Q Are you saying that the various subcontracts that you call subcontracts of the subcontractors on A-6b are an integrated part of an overall project that is the construction of site A-6b?

A Yes.

Q And that each subcontractor is controlled by WMATA [92] who is responsible for integrating and seeing that that site is prepared and ready for operation?

A Yes, sir.

Q I don't mean to be repetitious, but Ball-Healy and Granite has no responsibility in terms of the integration and overall finishing of that site?

A No, sir.

Q You have testified in response to some questions by Mr. Mulroney that WMATA has to acquire the site in order to enable the contractors to have access to these sites to do their particular work; is that correct?

A That's right.

Q Now, you also testified that the Authority does not own those sites and the sites are owned by the jurisdictions; that is, in the event of a bankruptcy or a breakup, you, being on the board of directors of WMATA, I assume, could not, as an owner, take the site and use it for your own purposes, could you, sir?

A No, sir.

Q And you, as on the board of directors of WMATA which runs the company and technically should own the land, could not, for example, mortgage that land without permission— [93] well, strike that question, because I think you can mortgage it to raise money.

In the event that the system is shut down, do any of the members of the board of directors have a right to divide up the system to liquidate it and to keep the money personally as you would do if you owned a home and you sold it?

A Not according to my understanding.

Q Would it be fair for me to state that the land that you get is land that you obtain in order to live up to your contract with the jurisdiction that is to construct the station?

A Yes, sir.

Q And that you hold that land as a trustee for the jurisdictions?

A Correct.

Q And you cannot dispose of that land in any way other than the way outlined in the compact?

A Correct.

Q If you actually own that land, would it be fair for me to state that you would have no restrictions if you were the actual owner of the land?

A That would sound reasonable.

[94] Q In terms of your testimony as to what you are, what you consider WMATA, you used what has been marked as Defendant's Exhibit 10, the language of Judge June Green, and you say you would adopt this position.

She says that WMATA is in the position of overall general contractor for subway construction in the Washington, D.C., area with the responsibility of supervising numerous consultants, general contractors, and subcontractors; do you ascribe to that?

A That's the concept I do, yes.

Q Are you aware that all contractors of whatever level on the projects on the sites at WMATA must attend weekly or monthly meetings presided over by the assistant general manager for construction? Are you aware of that?

A I am not aware of that.

Q Could you tell us who Mr. John Egbert is?

A John Egbert is the assistant general manager for design and construction.

Q Is he in essence the head of the Department of Design and Construction?

A Yes, sir.

Q Is he also referred to as the contracting officer?

[95] A Yes, sir.

Q I know you have testified that you can't recall whether you read the contract at issue, that is, the contract between Ball-Healy and Granite and WMATA. You were asked the question: Do you know why Ball-Healy and Granite was called a contractor? And I think your response—and correct me if I am wrong—was that you don't know; is that correct?

A That's correct.

Q Do you know why Ball-Healy and Granite was not named a general contractor?

A I don't know.

Q But is it a fact that they are not called general contractor on the document in question?

A That's correct.

Q Back to the Ball-Healy and Granite contract, Defendant's Exhibit No. 4, Mr. Ison, and more specifically referring you to the general provisions and standard specifications for construction of the project, which is made a part thereof, and more specifically referring you to paragraph 57 on GP-18, which is entitled "Authorized representative of the contracting officer," subparagraph A, are you aware that in this contract there is the clause that says, "The work [96] will be conducted under the general direction of the contracting officer. The engineer is the authorized representative of the contracting officer with authority to take all actions authorized herein which can lawfully be taken by the contracting officer, including the following," and then there is a whole list of things that the contracting officer or his authorized resident engineer can do.

Are you aware that there was that section in these contracts?

A I can't say I was specifically aware. I have general knowledge, but I was not specifically aware of that.

Q But is it your understanding that the contracting officer runs the particular job, each job on the project?

A That's the purpose of the contracting officer concept at the Authority.

Q You mentioned, Mr. Ison, two sections of the WMATA compact, and they were Section 4, which is Defendant's Exhibit 5, and Section 12, which is Defendant's Exhibit 6, and I think you stated that you were created by this compact with the authority to construct the total subway system; is that correct? You may not have mentioned these sections, but is that correct?

A Yes, sir.

[97] Q I am now showing you Defendant's Exhibit 6, subparagraph 12, is that the section that you were referring to in terms of giving the Authority the right and the duty contractually to construct this system?

A Yes, sir.

Q Is Section 4 the section that you were talking about that you were created under by virtue of the compact entered into by the three jurisdictions?

A Yes, sir.

Q You were asked some hypothetical questions about building. Let me ask you a couple of hypothetical questions. Assuming you were the general contractor to build a building, and I, the general contractor—we are talking about an office building—said to you, Mr. Ison, the plumber, "Would you put in some plumbing fixtures for me?"

And you, the plumber, said, "Well, do you want me to do the electrical? Do you want me to do the rod work?"

I said, "No. I just want you to do the plumbing."

In that hypothetical, Mr. Ison, would the plumber be a general contractor or a subcontractor?

A Subcontractor.

Q When you tell Ball-Healy and Granite "I want you [98] just to do the structural work," and Ball-Healy and Granite says, "Do you want me to do some tunnels for you?"

"No."

"A little soil testing?"

"No."

"A little finish work?"

"No."

"Put in some escalators?"

"No."

"Put in some elevators?"

"No."

"Do some kiosks?"

"No."

"A little substation equipment?"

"No."

"A little landscaping?"

"No."

"A little graphics?"

"No."

In that situation would you describe Ball-Healy and Granite as a general contractor or a subcontractor?

A That's a subcontractor.

[99] Q Let's talk about the insurance program. In your affidavit, Mr. Ison, you indicated that the subcontractors—I am talking about paragraph 4 of Defendant's Exhibit 9. We can share a copy if you want—you indicate that the subcontractors do not provide workers' compensation insurance for the employees, instead WMATA as general contractor provides workers' compensation insurance for employees of its subcontractors; is that correct?

A Yes, sir.

Q You also indicated in response to Mr. Mulroney's questions that this CIP or wrap-around program which provides this insurance came into being around July 30, 1971, in Phase II of the construction project; is that correct?

A Yes, sir.

Q First query is: WMATA pays the money for this insurance coverage; is that correct?

A Yes.

Q The subcontractors do not; is that correct?

A That's correct.

Q Is there anything to prevent a subcontractor from carrying his own workers' compensation insurance?

A Not as far as the Authority is concerned.

[100] Q The Authority does not—let me ask you this: Does the Authority say to a subcontractor, "Because we have got insurance for you, you can't get insurance, and that's a mandate"?

A No, sir.

Q There are specifications to your CIP program which have been outlined, and I am referring you to Defendant's Exhibit No. 3, which is also an attachment to the plaintiff's motion to supplement their opposition to defendant WMATA's motion for summary judgment in the Wilmes case, and on the the front page of that it says, "The contractors may at their own expense and effort obtain any other insurance they deem necessary." Is that a true and correct statement of the Authority's position?

A Yes, sir.

Q This exhibit, which is really the plaintiff's exhibit attached to their motion for summary judgment also says on page 6, paragraph G, "There is no other type of insurance and no higher limits than those described herein. Any increase in limits of liability for any other type of insurance not described above, which the contractor or any of his subcontractors obtain for their own protection or [101] because of statute, shall be their own responsibility and at their own expense." Is that a correct statement of the Authority's position?

A Yes.

Q Do you infer from that, sir, or would it be fair for me to infer from that they can certainly get their own insurance if they wanted to pay for it?

A That's correct.

Q On page 5 of the said exhibit, which is Defendant's Exhibit No. 3, it says, "The insurances by WMATA, except for the all risk cost of construction insurance, ap-

plies only to the operations of and for each contractor at and from the construction site and any other approved site. It does not apply to the operations of any contractor in his regularly established main or branch office, factory, warehouse, or similar place, nor to any employees of such operation."

Am I correct in my understanding that this is pursuant to your testimony that you insure the subcontractors, the sub subcontractors, and all their employees when they are on the WMATA site working on a discreet portion of the WMATA project?

A Yes, sir.

[102] Q Now, you were around during Phase I of the construction when the insurance program really was that each sub got his own insurance; is that correct?

A Yes, sir.

Q And you had some experience as a result of that Phase I; is that not correct?

A Yes, sir.

Q Did you ever have the experience of a subcontractor's insurance covering his employees being cancelled and the Authority not being aware of same?

A I can't recall any specific instance right now. Just based on my general knowledge, I think the records will show that we did, but I have no specific recollection of that.

Q If the subs took out the insurance as they did in Phase I, was there any responsibility of their insurance companies to notify the Authority in the event of cancellation of a workmen's compensation contract?

A Read that question to me again.

Q I am trying to find out, Mr. Ison, is in terms of your Phase I experience before CIP came in, did you find that the insurance companies who insured the subs also as a matter of courtesy notified the Authority and kept some [103] communication with the Authority so they

can keep control over this insurance whenever there was a problem with the workmen's insurance coverage?

A Yes.

Q Did they do that?

A Let me say this, about the only time—we would get notice, but we never did know that we got all the notices; because if they didn't give us notice, we just wasn't aware of it.

Q Was one of the reasons that you went to a wrap-around is to assure that you would know that there was insurance that employees of all the subs and sub subs were covered and you would have better centralized control?

A Absolutely.

Q Was another beneficial purpose of this wrap-around insurance your ability to assist minority contractors in obtaining contracts?

A Yes.

Q Could you elaborate on that?

A Well, we concluded early on that in view of the limits that we required, that we felt should be required, for a project this size, that minority contractors simply could [104] not participate in our program unless the insurance was provided for them, out of sheer cost, not only minority contractors but small contractors.

Q Is there a minority contracting program in effect at Metro which you are mandated by statute to live up to?

A Yes, there is, and I would have to call on Mr. Egbert to explain it, but I think generally it is about in the 12 to 15 percent range on construction contracts that minorities have to participate.

Q Would it be fair for me to state that the benefits flowing from the CIP program was, one, you fulfilled your legal duty; two, you had better control; three, it was more cost effective; four, it helped the employees of con-

tractors, subs, and sub subs being insured; and, fifth, it helped minority contractors?

A Yes, sir, all those are the reasons.

Q When you put this program into place, before you did it did you at least check out some other public transportation systems, and see what they were doing?

A Yes.

Q Can you tell us, does any other public transportation system in the United States have the CIP or wrap-around [105] program?

A I can say from personal knowledge that there is no subway construction program in the United States that do not have a wrap-around insurance program.

Q So this system is not unique to the Washington, D.C., area, is it, sir?

A That's correct.

Q And other jurisdictions who have subway construction ongoing all use this program for the reasons that have been stated?

A Yes, and I would like to say one other reason: I really don't believe that a program of this size where you have hundreds of contractors insured could be prosecuted under today's insurance market, because I don't believe the insurance money market is available to insure hundreds of contracts up to \$50 million limit. I just don't think it is there.

Q Let me go to the issue of legality. To your knowledge have any of the jurisdictions which have this program, have they ever been charged by the United States Attorney's Office, any state workmen's compensation authority, any Department of Labor authority, with doing something illegal by having this program?

[106] A No, sir.

Q Since the inception of this program in 1971 more than 11 years ago, have you received any complaints from any attorney who has accepted fees under this program?

A No, sir.

Q Have you received any complaints from any claimants who have accepted money under this program?

A No, sir.

Q Have you received complaints from the United States Attorney's Office?

A No, sir.

Q Have you received complaints from anyone at the Department of Labor?

A No, sir.

Q Do you have—has there even been a letter saying, "Well, maybe this is illegal. Maybe you ought to look into the legalities of this"? Other than the allegations made in this series of cases, have you ever had anyone complain about this?

A At the very outset—let me say this—in adopting the program, there was a lot of opposition by various small entities, brokers, et cetera, that stood to be impacted by this [107] program. But since the program has been in, I don't recall any letters of any such type.

Q Would it be fair to characterize these small brokers or small insurance companies as objecting to this because they are going to lose money?

A Absolutely.

Q One of the purposes of this program is to save the public dollars?

A Yes, sir.

Q And not to make the brokers and the small insurance companies rich?

A Right.

Q If the plaintiffs really wanted to find out the specifics of the operation of the general contracting arm of WMATA, would it be fair for me to state that chapter and verse could probably be delivered by Mr. John Egbert, the assistant general manager?

A Yes, sir.

Q For example, if they wanted to know why WMATA didn't have permits or licenses, or what contractual meetings they participated in, or how much control was exercised by WMATA and its employees, and what WMATA

employees were doing [108] in the field, the appropriate person to have gotten this information from would have been the assistant general manager for design and construction, who is the head of the Department of Design and Construction?

A Yes, sir.

Q To your knowledge has Mr. Egbert's deposition ever been taken by the plaintiff's attorneys in this case?

A Not to my knowledge.

Q To your knowledge has he ever testified in any evidentiary hearings at which these plaintiffs' attorneys were involved?

A I know he has testified, but not to my knowledge.

MR. COHEN: Well, to make a clear record, I would like a stipulation of counsel that they are aware of Mr. John Egbert, aware of his position, and have examined him under oath at other hearings.

Can we stipulate to that?

MR. HANNY: On a separate issue.

MR. MULRONEY: I know you don't care about the stipulation as to what it was about, but I will stipulate we examined him on the issue of Bechtel's agency to WMATA, but on nothing else.

[109] MR. COHEN: Let me move to strike that because my stipulation is that you knew of his existence, that he was assistant general manager of design and construction, that you have examined?

MR. MULRONEY: Well, I am going to object to your motion to strike. I think that the purpose of the examination was limited. We did not discuss any of the issues involved herein during the course of that direct examination and cross-examination.

BY MR. COHEN: (resumed)

Q If one wanted to find out who the board of Metro or who the officers were, is that a public record accessible to the public?

A Yes.

Q So if an attorney was interested in the construction operation of the Metro system and wanted to know whether they were a general contractor or what, there is a public record he could go to and find out who the assistant general manager for design and construction is; is that correct?

A Yes, sir.

Q And that department is called the Department of Design and Construction; is that not correct?

[110] A That's correct.

Q Let's talk about cost for a moment, Mr. Ison. I assume that WMATA is interested in keeping its costs down; is that not correct?

A Yes.

Q And I assume, especially in the time that the federal government is cutting back and inflationary times, that you were not interested in paying more money to insurance companies, employers, claimants, then [sic] you have to; is that a fair statement?

A Certainly that is a fair statement.

Q When you estimate the cost of these claims, would it be fair for me to state that if during a period of time following estimation, you find that one subcontractor on one job site is generating claims that is costing the Authority enormous amounts of money, that in all probability that contractor would be terminated under your powers of the contract?

A We would certainly have the right to and would take some action to either have it corrected or get rid of the contractor.

MR. MULRONEY: I am going to object to the question. I think the contracts will speak for themselves. And I do not [111] believe that the Authority has any power to terminate a subcontractor under them, only individual employees of a subcontractor.

MR. COHEN: Well, let me just clarify that now and find the clause, if I may. Let's take a brief break.

* * * *

Q To your knowledge, does the Authority have the right—and let's talk about the Wilmes case—did the Authority have the right to terminate Ball-Healy and Granite's subcontract, I will call it, if they were dissatisfied with the quality of work, the safety aspect of the work, or any other term or condition spelled out in the contract?

A It is my understanding that they do, but that question is better answered by Mr. Egbert.

Q Okay. And/or the contract?

A And/or the contract.

Q Back to the cost of claims. Is the Authority concerned about the safety of employees of the subcontractors and the sub subcontractors, and the sub sub subcontractors?

A Very definitely so.

[112] Q Is that because there is an economic and a moral reason?

A Yes. I would even go stronger than that; I would view it as the responsibility of a public official, almost a legal responsibility to make sure that the public funds are protected.

Q If Ball-Healy and Granite or any sub of Ball-Healy and Granite—

(Short interruption.)

BY MR. COHEN: (resumed)

Q Mr. Ison, let me just see if I can ask you a couple final questions. You are a member of the board of WMATA; is that correct?

A No. I am a staff of WMATA. I'm an officer of WMATA, let's put it that way.

Q If it came to your attention as an officer of WMATA that a subcontractor like Ball-Healy and Granite or a sub sub or a sub sub sub of Ball-Healy and Granite was not concerned about the safety of their workers, would it be fair for me to state that you, as an

officer of WMATA, would attempt to take appropriate corrective action which might even lead to termination of the contract?

[113] A Yes. It so happens that I am—since I am involved in insurance programs, that I do have an interest in the safety, and we would certainly institute appropriate investigations to see what was going on.

Q So if a sub or a sub sub displayed an obvious and a callous disregard toward the safety—and, of course, those words are subject to definition—but if it was really very, very clear, in a smoking-gun kind of situation, would it be fair for me to state that that sub, or that sub sub, would jeopardize his economics in terms of performance of the contract?

A I understand that if that situation was called to the attention of John Egbert, that he would take appropriate action to redress the situation.

Q These claims in this \$1.6 million that you have in the past been paying Lumbermen's Mutual Casualty, these funds, are they public funds?

A Yes.

Q Do they come out of your construction budget?

A It comes out of the construction budget.

Q So would it be fair for me to state that for every claim on money that's paid in public funds to a claimant, [114] there is less money to construct this system?

A Very well put, and I tried to make that argument with our top management down there. That's why we should have a good safety program, to keep the cost of claims down.

Q This construction money, this public money, it comes from the jurisdictions in the federal government?

A Yes, sir. The locals put up a certain percentage and the feds match that.

Q This is not money that is expected to be recaptured much like in a profit-making venture, is it, Mr. Ison?

A No.

Q The construction of the subway system is for the public good?

A I would hope so.

Q And WMATA does not hold itself out as a profit-making entity much like—maybe not true now—but PanAm, and TWA, and IBM?

A No, sir.

Q And others. Mr. Ison, you currently run the insurance program?

A Yes, sir.

Q You have done so since when, sir?

[115] A Since the inception of the Authority.

MR. COHEN: Before I let Mr. Ison go, Mr. Mulroney, I want to move certain documents into evidence, and I may need him if you have any objection. So with your permission—or do you want to finish your redirect, and then we can deal with that, or would you rather do it now?

MR. MULRONEY: You can do it now.

* * * *

MR. COHEN: The defendants are going to move—not into evidence—but at least into the deposition for attachment as part of our record of this deposition, Defendant's Exhibit Numbers 1 through 10.

So I do that. I am going to package them up and hand them to you; and you can state any objections you have, Mr. Mulroney, on the record.

FURTHER EXAMINATION BY COUNSEL FOR THE PLAINTIFF

BY MR. MULRONEY:

Q Mr. Ison, when Ball-Healy-Granite was in the process of completing its contract, what does WMATA do prior to taking possession of the job site?

[116] A I hope you understand I really don't know. I just have a very general idea, but I know they are very

careful before they release the contractor from all further responsibility, and I know that sometimes—and the reason I know this is because the insurance is involved—we have what we call completed insurance, and they are very careful not to release a contractor from that job until everything has been thoroughly checked out, but really Mr. Egbert could address that.

Q But upon an inspection and acceptance of the work, the Authority does take possession of the job site, don't they?

A Well, I don't know whether "possession" is the proper word. I will say that I know the contractor is in effect given a release from any further responsibility on that contract. I don't know whether possession actually changes because the contractor is given a release.

Q The contract document would control in that regard?

A Yes, yes.

Q You said that Ball-Healy-Granite was in your opinion a subcontractor assigned to do structural work?

A Yes.

Q I haven't asked your opinion—what do you think structural work is?

[117] A You know, in this contract, to be quite candid, I am not sure. Generally construction work has to do with building the—

MR. COHEN: Structural work.

THE WITNESS: —inverts where the rails are laid, the walls, the ceiling, the platform, and that's just about it. Just the structural work.

I will give a good example, one everybody sees. If you take the National Airport, a lot of people would say that that's just structural work, but actually there was two contractors: structure, built the structure, and then the finished product. So just pure concrete and steel, the pure structure, is about all the structural contractor does.

BY MR. MULRONEY: (resumed)

Q Do you have any knowledge as to whether Ball-Healy-Granite actually excavated those stations in addition to providing structural supports?

A I have no knowledge on that. I was told by the officer and responsible official at design and construction that the tunnels for this section were bored separately, and I don't know what he really meant when he said that.

[118] Q There is a big difference between the tunnels, that is the tubes where the trains now run, and the stations where the people get off and exit from the cars and get on the cars?

A That's right.

Q And this contract with Ball-Healy-Granite was for the excavation of three very large—we know because they are open now—Cleveland Park, Zoo Park and Van Ness stations, was for the excavation of the station itself, wasn't it?

A I really am not going to answer that because I really don't know. I think Mr. Egbert ought to answer that question.

Q The contract will speak for itself.

A That will speak for itself.

Q I am going to show you one further exhibit, and I am going to mark it as Plaintiff's Exhibit No. 8.

(Thereupon, the document was marked as Plaintiff's Exhibit 8 for Identification to the Ison deposition.)

BY MR. MULRONEY: (resumed)

Q Can you identify that document?

[119] A It says page 13. I really don't know where it came from.

Q Let me show you page 1 of the document. Do you have any idea what that document is?

A I really can't say, and I'm not trying to evade your question. I simply don't know the purpose of the document or what it purports to—what role it purports to play.

Q See if this refreshes your recollection. If I were to tell you that that document is showing all the contractors and their subcontractors covered under the Phase II coordinated insurance program, does that refresh your recollection?

A I will tell you why it doesn't. I don't think I have ever seen the contractors listed in a single document under the coordinated insurance program.

MR. MULRONEY: I will withdraw the exhibit then.

BY MR. MULRONEY: (resumed)

Q Do you have any personal knowledge as to how many subcontractors Ball-Healy-Granite had on the A-6b project?

A No, sir, I don't.

Q Do you know what kind of subcontractors they subcontracted with?

A No, I don't.

[120] Q Did you ever visit the site in your tenure as treasurer or secretary?

A Yes. I am not sure I have been in all the stations, but on a regular tour I have been there. I have been through one of those stations out there.

Q Coming back to the rights the Authority has in the land on which the subway project is built, is it fair to say that the Authority does have an ownership right in that property?

A They have ownership rights as far as getting title to the land in order to allow the contractor to commence his work, yes.

Q In other words, they are not absolute rights; they are limited rights; is that correct?

A Well, again—and I hate—but the Department of Design and Construction has a big office of real estate and they handle all this.

Q You testified that you went to San Francisco to observe the BART system?

A Yes.

Q Did you have any discussions out there with any officials of BART system as to whether they consider themselves [121] general contractors or owners of the project in question?

A No, not to my knowledge.

Q When did you first come to the conclusion that WMATA was a general contractor on this Metro project?

A When the question was first raised in reviewing the manner in which we go about doing this.

Q When was that?

A Well, I guess the first time the question came up was when we prepared the affidavit.

Q Is it your function at WMATA to deal in the—to deal generally in lawsuits either by the Authority or against the Authority in your function as secretary and/or treasurer?

A Well, I can answer that no. I think I have testified in my 11, 12—actually I have been with the Authority 15 years—I think I only testified two or three times. Usually it is left up to each contracting officer for each department.

We have seven departments in the Authority. Each one of them has a contracting officer: finance, general administration, government relations, counsel, you know.

. . . .

[122] Q You testified a few minutes ago that WMATA is not a profit-making organization; is that correct?

A That's correct.

Q So in effect your testimony would be that WMATA is a non-profit-making general contractor created by statute?

. . . .

[123] THE WITNESS: I can't say we are characterized as a non-profit organization. Let me explain exactly what I have in mind. Our annual deficits for our operations approximate \$165 million, so obviously we are not making money, but I can assure you we are not chartered to be a non-profit organization.

MR. COHEN: Let me object unless the question is phrased in the context in which he responded. The question we talked about is the recapture of capital expenditures in the construction fund.

In every profit-making organization in the United States of America when capital funds are expended, they are expected to be recaptured. And his question is going to just a general characterization of the operational side as distinguished from the constructional side.

I will object to the question unless you either break it down to operation or construction, because I think there are two arms to this entity under the compact.

[124] THE WITNESS: That's true.

BY MR. MULRONEY: (resumed)

Q Let's go back just for a second to your testimony that in 1970 and '71 when the CIP was being instituted, that you were very concerned about your statutory obligations to pay for workers' compensation benefits.

At the time of the institution of the CIP, did you or anybody associated with WMATA, to your knowledge, consider the applicability of Section 904a of the Longshoremen's Harbor Workers Act? Are you familiar with that section?

A Yes.

MR. COHEN: You can answer that, but let me object on the grounds that the appropriate individual in legal matters concerning the Authority is the general counsel's office, and he is the secretary.

You can certainly ask him what he considers; but in order to make a clear record, I want you to understand that the Authority's legal position is always articulated through its general counsel.

You can answer that, if you can.

THE WITNESS: I was just going to say I am not even sure at that time about 904 particularly, but I was [125] very much aware.

Our general counsel's office certainly was very, very instrumental in this whole thing at the beginning as to what workers' comp laws we were to comply with. They concluded that we were under the Longshoremen's Harbor Workers Act.

BY MR. MULRONEY: (resumed)

Q They concluded that the Metro construction would be jurisdictionally covered by the Longshoremen's Harbor Workers Act?

A To the extent the contractors were domiciled in the District of Columbia, and at that time I understand that even some of the contractors that were outside D.C., because of union agreements, were subjected to the Longshoremen Harbor Workers Act.

Q You testified just earlier that you really first concluded that WMATA was a general contractor just several months ago?

MR. COHEN: That's not his testimony. You asked him when he first was considered, and he said several months ago.

MR. MULRONEY: I said when did he first conclude that WMATA was the general contractor, and he said several [126] months ago.

MR. COHEN: I think in fairness to this witness you have to ask him if pre several months ago was WMATA the general contractor or not, because people don't put labels on themselves until they are asked.

THE WITNESS: That's what I tried to say.

BY MR. MULRONEY: (resumed)

Q Well, absent the label of contractor or general contractor, what liabilities would WMATA have for the procurement of compensation under Section 904a?

A Absent the what?

Q Absent the status of contractor or general contractor, what legal obligation would WMATA have to pay? You testified that you were very concerned about WMATA's obligations 12 years ago?

A As the law was interpreted to me by our general counsel, interpreting the Longshoremen Harbor Workers Act, the Authority was legally responsible to provide workers' compensation insurance coverage under the wrap-up for every employee on this project, subcontractors at whatever tier.

We had a legal responsibility to do this, and one of the reasons we put the wrap-up in was to make sure that we [127] could meet this legal responsibility, and avoid having this situation where fly-by-night insurance companies would cancel out without our knowing about it; and we knew if we could have one policy to cover all these entities, including all their employees, that we would have full control over our legal responsibility.

Q When you were out in San Francisco observing the BART system, did you learn how that system was supervised and monitored?

A I believe they have a contracting officer pretty much like we do, but I can't—because I wasn't out there for that purpose. I was out there to find out how the coordinated insurance program functioned.

MR. MULRONEY: That's all I have.

FURTHER EXAMINATION BY COUNSEL FOR THE DEFENDANT

BY MR. COHEN:

Q One correction for the record. Mr. Ison, Mr. Mulroney asked you what do you think the structural work entails; and as I recall you [sic] answer, you said "construction" work entailed. I assume you meant to respond to this question of "structural" work. Is that correct?

A That's what I thought I said.

* * * *

[128] MR. COHEN: Let's go off the record for a moment?

(Thereupon, an off-the-record discussion occurred, and then the deposition continued as follows:)

MR. COHEN: It is hereby stipulated between counsel that in light of plaintiff's counsel utilizing Plaintiff's Exhibit No. 5, the schematic from Collier's, in light of defendant's counsel's concern about the accuracy, quality, weight, evidentiary value of this particular document, which comes from a book called "Collier on Contracts," that the defendant's attorneys have the right to transmit to both counsel for the plaintiff and to the court reporter for inclusion in the record as Defendant's Exhibit No. 11, any portion of Collier's that they deem relevant to those issues, and to any issues that the schematic pertains to.

Is that correct, Mr. Mulroney?

MR. MULRONEY: That's fine.

BY MR. COHEN: (resumed)

Q Mr. Ison, since the beginning of the construction has it always been your understanding that Metro had the contractual duty to construct the entire system; do you understand the question?

A Yes. Yes, it has.

[129] MR. MULRONEY: I am going to object to the use of the term "construct." Construct through WMATA personnel or through other people?

MR. COHEN: Let me make it clear, as I understand Mr. Ison's testimony, he said that the compact was the contract that gave the duty to WMATA to construct this system, and that WMATA could do it a number of ways: ergo, forming their own construction company, et cetera, but they decided to do it by a series of contracts, but I think that testimony is in the record.

My only question to him is, was that his understanding at the inception of the compact? Obviously the compact speaks for itself. I am trying to get his understanding. Did he at any time ever feel—

BY MR. COHEN: (resumed)

Q Let me ask it this way: Did you at any time ever feel since you have been at Metro that the duty to construct the entire system rested with some other entity?

A No.

.

[130] Q Are you aware in terms of one of Mr. Mulroney's questions about possession of the site, that the subcontractors such as Ball-Healy and Granite by virtue of their contracts must warrant the quality of their work on that site for one year, and can be forced to return at any time to correct any deficiencies within that one year; are you aware of that contract provision?

A I am not aware of that.

Q Are you aware that the contract contains a provision for simultaneous contractors on the site at the same time?

A I am not aware of that.

Q To your personal knowledge do you personally know whether there have been contractors simultaneously on a job site at the same time?

A I am sure there has been, obviously because much of this work of Exhibit 2 has to commence before the prior work is finished.

MR. COHEN: I have no further questions. Off the record.

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[132] CERTIFICATE OF THE DEPONENT

I have read the foregoing pages 5 through 131, inclusive, and find the answers to the questions therein contained to be true and correct, with the exception of changes, if any.

/s/ Delmer Ison
DELMER ISON

Dated: Nov. 9, 1982

CERTIFICATE OF NOTARY PUBLIC

SUBSCRIBED AND SWORN TO BEFORE ME this
9th day of November, 1982.

/s/ Lora D. Graves
(NAME)

NOTARY PUBLIC IN AND FOR
THE DISTRICT OF COLUMBIA

My Commission Expires: Jan. 14, 1985

[SEAL]

[133] CERTIFICATE OF NOTARY PUBLIC

I, NORMA NASUTI COSTELLO, a Notary Public in and for the District of Columbia, before whom the foregoing deposition was taken, do hereby certify that the witness whose testimony appears in the foregoing deposition was duly sworn by me; that the testimony of said witness was taken by me in Shorthand at the time and place mentioned in the caption hereof and thereafter reduced to typewriting under my supervision; that said deposition is a true record of the testimony given by said witness; that I am neither counsel for, related to, nor employed by any of the parties to the action in which this deposition was taken; and, further, that I am not a relative or employee of any counsel or attorney employed by the parties hereto, nor financially or otherwise interested in the outcome of this action.

/s/ Norma Nasuti Costello
NORMA NASUTI COSTELLO
NOTARY PUBLIC IN AND FOR
THE DISTRICT OF COLUMBIA

My commission expires: August 14, 1984

ERRATA SHEET OF
DELMER ISON DEPOSITION
TAKEN ON NOVEMBER 3, 1982

Page	Line	As Transcribed	Changed to
6	18	president	Secretary
16	6	constructional	structural
16	14	in	and
16	15	They	We
30	7	cooperation	operation
58	10	jurisdiction	jurisdictions
60	10	roots	routes
79	7	to	by
127	1	—	add "meet" before "this legal responsibility"

/s/ Delmer Ison
DELMER ISON
Dated: Nov. 9, 1982

CERTIFICATE OF NOTARY PUBLIC

DISTRICT OF)
) ss:
COLUMBIA)

Subscribed and sworn to before me this 9th day of
November, 1982.

/s/ Lora D. Graves
Notary Public
District of Columbia

My Commission Expires: Jan. 14, 1985

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 81-0114
(Judge Flannery)

STANLEY WILMES,
Plaintiff,
v.

WASHINGTON METROPOLITAN AREA
TRANSIT AUTHORITY,
Defendant.

Washington, D.C.
Wednesday, November 3, 1982

DEPOSITION OF DAVID L. SEWALL,

a witness, was called for examination by counsel for the plaintiff, pursuant to Notice and agreement of the parties as to time and date, beginning at approximately 3:15 o'clock, p.m., in the law offices of Ashcraft & Gerel, Esquires, 2000 L Street, Northwest, Washington, D.C. 20036, before Norma Nasuti Costello, a Notary Public in and for the District of Columbia, when were present on behalf of the respective parties:

[2]

APPEARANCE OF COUNSEL

For the Plaintiff:

ASHCRAFT & GEREL, ESQUIRES
By: WILLIAM F. MULRONEY, ESQUIRE
JAMES M. HANNY, ESQUIRE
2000 L Street, Northwest
Washington, D.C. 20036

For the Defendant:

HOGAN & HARTSON, ESQUIRES
 By: VINCENT H. COHEN, ESQUIRE
 ROBERT B. CAVE, ESQUIRE
 815 Connecticut Avenue
 Washington, D.C. 20006

I N D E X

<i>Witness:</i>	Page
David L. Sewall	
Examination by Mr. Hanny	
Examination by Mr. Cohen	
Further examination by Mr. Hanny	
Further examination by Mr. Cohen	
 <i>Exhibits:</i>	
Plaintiff's Exhibit Number 1 for Identification to the Sewall deposition (Affidavit of David L. Sewall)	

[3] THEREUPON,

DAVID L. SEWALL,

a witness, was called for examination by counsel for the plaintiff, and after having been first duly sworn by the notary public, was examined and testified as follows:

EXAMINATION BY COUNSEL FOR
THE PLAINTIFF

BY MR. HANNY:

Q Mr. Sewall, could you give us your full name, sir?

A David Lee Sewall.

Q Your present address?

A 15109 K-A-M-P-U-T-A Drive, Centreville, Virginia, 22020.

Q Mr. Sewall, what is your present position with NATLSCO?

A I am the branch claims manager of the Fairfax, Virginia, office.

Q What area do you work? Do you work in the workmen's comp side or liability side, if I can use that term?

A I am the branch claim manager; and as such, I would be responsible both for liability and compensation, auto, fire [sic] theft.

Q How many adjustors do you have working under [4] you directly in that area?

A I have eight adjustors working for me.

Q How long have you been with NATLSCO?

A NATLSCO itself, I have been with NATLSCO since 1975.

Q How long have you been in the Washington, D.C., area with NATLSCO?

A Since 1975.

Q By the way, NATLSCO is a subsidiary of Kemper?

A NATLSCO is a subsidiary of Kemper Corporation.

Q When was it incorporated or created?

A What, the Kemper Corporation?

Q No; this is NATLSCO.

A I have no idea.

Q Was it created specifically to adjust the workers' compensation third-party liability claims brought as a result of the Metro subway project?

A No.

Q What was the purpose of its creation?

A Oh, NATLSCO, National Loss Control Service Corporation, is a subsidiary of Kemper Corporation and was created, as far as I know, for multi purposes for self insurance.

[5] Q For self insureds?

A For self insureds.

Q Is Metro a self insured, in your opinion?

A In my opinion, no.

Q What would you classify it as?

A I would classify it as an insured, because they have an insurance policy with Lumbermen's Mutual Casualty Company.

Q Where else does NATLSCO operate, Mr. Sewall, other than in this area?

A In all 50 states of the Union, plus in Japan.

Q Do they function in a similar capacity, let's say, in the subway project underway in Atlanta, Buffalo, New York?

A I have no idea.

Q You are just familiar with operation here in Washington, D.C.?

A Yes.

Q How long have you been with Kemper overall?

A I joined Kemper in 1964.

Q In what capacity?

A As a claim adjustor.

* * * *

[6] Q Mr. Sewall, what is your understanding of the term "general contractor"?

A My understanding of the term "general contractor" would be one who would have the power to control a construction project and to hire parties that may aid them in a construction project.

Q Is it your understanding, sir, that a general contractor in many instances would contract out with specialized [7] companies to perform special work, such as electrical, plumbing, heating and air conditioning, tile work?

A Yes.

Q Things of that nature?

A Yes.

Q What is your understanding of the term "prime contractor"?

MR. COHEN: Well, let me just note an objection here. Certainly he is going to answer all your questions, but his affidavit uses the term "subcontractor." It doesn't use "general" nor "prime."

Obviously I think it is fair to inquire about general since sub flows from that, but I think when you get—my objection only flows to the fact that he has not been qualified as an expert in the use of contractual terms, and I think "prime" is perhaps a word of art.

But with that objection noted and noting it is outside the scope of the order, you can certainly ask him.

THE WITNESS: "Prime" I believe in the English language means first; and as such, that's what I would understand prime contractor to be. It would be the first contractor.

BY MR. HANNY: (resumed)

[8] Q Would you equate the term "prime contractor" with "general contractor"?

A No.

Q So just for clarification purposes, are you saying that your understanding at least of a prime contractor is one who initiates the contract in the beginning?

A I don't understand what you are—I understand prime to mean first, and that would be the first contractor.

Q The first contractor?

A That's what it says, prime contractor, first contractor.

Q How do you distinguish that then from a general contractor, just for clarification?

A General contractor would have the—to me—overall sayso. He may hire somebody else down the line as a subsidiary to give him assistance.

Perhaps a prime and general may be interchangeable. I don't know. I am not a contractor. I am a claim man.

Q Of course, this is just your interpretation or your understanding, Mr. Sewall. What is your understanding of the term "subcontractor"?

A Sub would mean—it comes from the English word [9] meaning below. Therefore, a subcontractor would be below the prime contractor.

So you would have your prime contractor, which means first contractor; subcontractor which means below contractor or below the prime contractor.

Q Within your understanding of the meaning of the subcontractor, could you give me an example of a subcontractor?

A Subcontractor would be, for example, an electrical contractor, if I were to hire a contractor to put some electricity in a house I was building; if I were acting as my own general contractor, he would be my subcontractor.

Q Would it be your understanding, Mr. Sewall, that a company who had a speciality of putting in tile, let's say, on a deck, could be considered a subcontractor?

A I would say so, yes.

Q Would you consider a company with a specialty in underground electrical work such as Tunnel Electric, could be a subcontractor?

A Yes.

* * *

[10] Q Are you familiar with or do you have any knowledge of the fact that WMATA, Metro, is alleging a status of general contractor?

A I have that knowledge, yes.

Q Do you understand the legal implications of such a title?

A No.

* * *

[16] Q Prior to this date, August 20, 1982, what was your understanding as to WMATA's title in terms of how they would classify it?

A WMATA's title?

Q Yes, sir.

A WMATA's title was Washington Metropolitan Area Transit Authority.

[17] Q That wasn't really my question. What I am saying is that prior to August 20, 1982, was it your understanding that WMATA was a general contractor, an alleged general contractor?

A It was my understanding that WMATA had responsibility for building the entire subway system.

Q Was it your understanding that WMATA was a general contractor?

MR. COHEN: Let me object and note for the record that the term "general contractor" is never used in this affidavit.

THE WITNESS: As I stated, my understanding is that WMATA had the responsibility for building the entire subway system. If that's a general contractor, then, yes, that's what my understanding of them was.

BY MR. HANNY: (resumed)

Q Well, prior to the date that you signed the affidavit, did the subject of WMATA being an alleged general contractor come up?

A I can't recall whether that came up or not.

Q What was your understanding prior to August 20, 1982, [18] as to what Ball-Healy-Granite was?

A That they were a prime contractor?

Q A prime contractor?

A Yes, Sir.

Q With what duties and responsibilities?

A I am not sure what their duties and responsibilities were. I do know that Ball-Healy-Granite was a prime contractor for Section A-6b, I believe it was.

Q Which was the excavation of three large stations known as: Woodley Zoo Park, Cleveland Park, and UDC Van Ness Station; is that correct?

A I believe that is correct.

* * *

[19] BY MR. HANNY: (resumed)

Q The question I had, Mr. Sewall, is that the tube boring, the actual boring of the tubes that the train runs in had already been completed by another corporation, correct, sir, if you know?

A This is correct.

Q Other than the excavation work on the three stations known as A-6b by Ball-Healy-Granite, what other general functions did they have as prime contractor?

MR. COHEN: If any.

THE WITNESS: I have absolutely no idea what their other functions were.

BY MR. HANNY: (resumed)

Q Is it your understanding that there were other companies, contractors, that performed specialty work on those stations either concurrently when Ball-Healy-Granite

was doing their work, or, you know, at the end of the excavation, or towards the ends of the excavation?

A This is my understanding.

Q What is your understanding of some of the names of those companies, just off the top of your head?

[20] A I would hate to venture to tell them off the top of my head, because under the Metro system there were hundreds of contractors working, and some may have been working on A-6a, A-6b, FA6. Just which ones worked on which projects, I have no idea off the top of my head.

Q There were companies that performed speciality work; is that correct, Mr. Sewall?

A Some of them performed specialty work, yes, sir.

Q Does the name Tunnel Electric ring a bell in terms of a company that worked on A-6b doing specialized work?

A I can't say that Tunnel Electric worked specifically on A-6b. They may have.

Q What was the relationship, if you know, between those companies that we just talked about and the joint venture of Ball-Healy-Granite?

MR. COHEN: Let me object here because the witness has indicated that he doesn't know if any of those companies worked on the project, and, therefore, if he doesn't know that as a predicate, he obviously can't know the relationship, because it hasn't been established that those companies worked on the project.

For that reason I will object.

[21] BY MR. HANNY: (resumed)

Q You may answer.

A That they may—if Tunnel Electric did work on A-6b, they may have been a subcontractor to the prime contractor on the project.

Q So let's assume arguendo that Tunnel Electric worked at some portion or at some time on three stations known as A-6b, would you or was it your understanding

that that company, assuming that that company worked there, was a subcontractor?

MR. COHEN: Let me just move—he can certainly answer—but let me just move to strike all hypotheticals unless there is documented evidence that this witness has personal knowledge of who worked on there [sic], what they did, and all hypotheticals I move to strike.

You clearly can try to answer.

THE WITNESS: Could you please repeat the question?

MR. HANNY: Actually I think I could probably help Mr. Sewall a little bit.

BY MR. HANNY: (resumed)

Q I would like to show you a document, sir, which has been marked as Plaintiff's Exhibit No. 2 for purposes of [22] Bob Thompson's deposition. I refer you to page 11. I would like you to look at that, sir, and towards the bottom two-thirds of the page there is the name Ball-Healy-Granite; do you see that?

A Yes, I do.

Q Underneath that are several names—I think 15 or whatever—of companies; do you see that?

A This is correct.

Q Do you see the name "Tunnel Electric" typed in there?

A Yes, I do.

Q There are other outfits

A There are other firms named there.

Q Is it your understanding that Ball-Healy-Granite was the prime contractor on A-6b, and that the names under that, including Tunnel Electric, were subcontractors?

MR. COHEN: Let me object to the form of the question. You certainly have a right to ask the witness what was Ball-Healy and Granite and what are the other names, but to suggest to him that Ball-Healy and Granite was a prime and these were subs, I can conceivably sug-

gest to him that he has no personal knowledge of who was on the project, and he [23] doesn't know if any of those people were on the project.

Clearly I could also inform him that Mr. Thompson has testified that to National Loss Control, that that list just means a certificate of insurance was issued. He doesn't know who was on the project.

So in fairness to this witness, you have to ask him straight out and not lead him. This is your witness. This is your direct examination.

BY MR. HANNY: (resumed)

Q You can answer the question, Mr. Sewall.

A Could you please repeat the question?

Q Let me just preface repeating the question with another question. Have you ever been at the A-6b project when it was under excavation by Ball-Healy-Granite?

A I may have and I may not have. I can't recall.

Q In reference to Plaintiff's Exhibition No. 2, I believe, for purposes of Thompson's deposition, referring to page 11, I believe—

A Page 13.

Q Page 13, you see the name Ball-Healy-Granite?

A Yes, I do.

Q Is it your understanding that Ball-Healy-Granite [24] was a prime contractor on the A-6b project?

A It is my understanding that Ball-Healy-Granite was the prime contractor on this particular contract.

Q Do the names under that, Mr. Sewall, which includes Tunnel Electric—and there are several other names—do you have any personal knowledge as to what functions any of those companies performed?

A No.

Q Are you familiar with or do you know from personal knowledge by whom Stanley Wilmes worked?

A The only personal knowledge that I have would be from looking at his file, and I don't have his file with me right now, so, therefore, I can't really tell you.

Q Is it your understanding, sir, that Mr. Wilmes worked for Ball-Healy-Granite as a hard wreck miner?

A I can't tell you. As I said, we have numerous files in the office.

Q You didn't have an opportunity to review Stanley Wilmes' compensation file to determine who his employer was?

A I may have at one time, but there were 3 or 4 thousand, 5 thousand, files in the office. I can't recall off the top of my head right now who his employer was.

[25] Q Assuming for purposes of the deposition that Stanley Wilmes worked for Ball-Healy and Granite, who would he be working for in terms of the classification of Ball-Healy and Granite?

A He would be working for the prime contractor.

MR. COHEN: Just a minute, Mr. Leyden. An assumption where the witness says he doesn't know, because the witness has called this prime contractor in his deposition a subcontractor, so it seems to me that there is an air of confusion about this.

So for you to say "assuming," when he says he doesn't know who he worked for, et cetera, is what I object to.

I also want to say in fairness to the witness, he is here to be questioned about his affidavit, and this deposition has gone very, very far afield, and it was represented to the Court that these people were being brought in on the coordinated insurance program, which I haven't heard any questions about yet.

With those comments you can certainly keep inquiring. You will probably have to repeat the question.

MR. HANNY: For purposes of clarity, I am questioning Mr. Sewall about his affidavit dated August 20, 1982.

[26] BY MR. HANNY: (resumed)

Q Mr. Sewall, assuming that Mr. Wilmes worked for Ball-Healy and Granite, would he be working for a prime contractor or a subcontractor, in your opinion?

A In my opinion he would be working for the prime contractor of Section 1A0062 or A-6b. Again, this is—they were a subcontractor of the Authority in this particular section; so whether you want to say that is working for a subcontractor, or prime contractor, or a sub subcontractor, or whatever, you are the legal person. I am just calling them as I see them out here.

Q But it is your opinion that if he worked for Ball-Healy-Granite, he would be working for the prime contractor on the excavation site known as A-6b?

MR. COHEN: He also testified—in fairness to this witness in his answer—that he calls that prime contractor, the subcontractor of the Authority. So he uses two definitions.

THE WITNESS: I would have to say yes, because his location code shows 12101000, and 000 would indicate that that was a prime contractor.

* * * *

[27] Q Mr. Sewall, are you familiar with the CIP program, coordinated insurance program, known as wrap-up?

A Insofar as I handle claims under the CIP program.

Q Who administers the wrap-up program on WMATA?

A What do you mean by "administers"?

Q Well, there is a term known as MIA or Metro Insurance Associates; are you familiar with that term?

A Yes.

Q They are not affiliated or they are not employees of Metro; is that correct?

A I can't answer that of my own knowledge. Well, maybe I can. I think they are employees of Johnson and Higgins.

Q Which is a brokerage firm out of New York City; [28] is that correct?

A I have no idea where they are out of.

Q The wrap-up or CIP insurance program was initiated around October 1971; is that your understanding?

A This is the date that is used on the policy, as I recall.

Q Prior to that date when wrap-up was initiated on the Metro project, is it your understanding that the contractors who were selected to build Phase I provided their own workers' compensation and liability coverage?

A I have no idea on that. I came here in 1975. Just what transpired prior to 1975 I have absolutely no idea.

Q You don't have any understanding as to what the insurance arrangement was prior to the coordinated insurance program?

A I believe some of the companies may have carried their own insurance. I am not at all completely familiar.

.

[30] Q Would you agree that a wrap-up program administratively is to the benefit of Metro?

A I think administratively it is more to the benefit of the general public rather than to Metro.

Q Well, the question is: Does it benefit Metro administratively by having one insurance company and one adjusting arm of that company cover and administer claims?

A Probably.

.

[31] Q I am almost through, Mr. Sewall. Let me ask you this: What is your reason or why do you classify a company such as Ball-Healy-Granite as a prime contractor vis-a-vis a general contractor?

A Because there are numbers, the first numbers under that particular contract.

Q I mean other than the numbers.

Well, is that what you are basing your testimony on, the numbers that precede—

A Well, this is what I would have to if I were to take a look at this listing here. This is what I would ask for, because you have here a number of different pages.

We have, I would say, if I take a look at this, a [32] thousand and some odd contractors, and the only way that I can tell which is the prime contractor, what I would

consider a prime contractor, would be to take a look at the numbers.

Q Let me come over and join you, because I want to ask you a couple of questions about the numbers. This is in reference to Plaintiff's Exhibit No. 1 for purposes of Mr. Thompson's deposition.

On the left-hand side there are a series of numbers. Let's take Ball-Healy-Granite, and there is the number 12101000.

Would you tell me what that number means?

A That number means that this is a location code indicating that this is the first contract let under this particular project, 1A0062; or as you referred to it earlier, as A-6b.

Q So that just tell [sic] us that that's the first contract that was let?

A Under that particular project, yes, sir.

Q By Metro to Ball-Healy-Granite, joint venture?

A I can't say that would be the first contract let to Ball-Healy-Granite, joint venture. They may have had other contracts.

[33] Q In terms of the A-6b project?

A In terms of A-6b project, yes.

Q That was the first A-6b contract entered into between WMATA and a company to excavate the A-6b project?

A If that's what they were hired to do, yes.

Q The next one, the next company is District Utilities, code number to the left is 12101001.

MR. COHEN: Excuse me a minute, Jim, and I will let you go right down the list. Let me make a continuing objection and continuing motion to strike this witness's testimony because it is not based upon personal knowledge of when the contract was executed, but is based upon numbers that I don't think a predicate has even been laid that he prepared these numbers.

Therefore, he is testifying in a guesstimate fashion based upon numbers, and I think that that is not sufficient for testimony under oath that can be used.

If you can indicate for the record that he prepared these numbers after looking at the contracts, comparing dates, seeing that this was the first contract and what it was for, I withdraw my objection.

But if he is going to continue in this fashion, [34] I would note my continuing objection and my continuing motion to strike.

With that, I say nothing else, and let you finish.

BY MR. HANNY: (resumed)

Q You may answer, sir.

A That number there would tell me that they would be the second contract that was let under that particular project.

Q The A-6b project?

A Yes.

Q Then it goes down the list?

A This is correct.

Q These numbers that I referenced to you, the numbers on the left-hand side, whose numbers are they, if you know?

A They were devised, as far as I know, by the Metro Insurance Administrators.

Q As a code reference to those contracts, those companies that were going to be covered under the wrap-up?

A This is correct.

Q Do you have any knowledge, sir, as to the general classification of the companies under Ball-Healy-Granite: District Utilities, Geo-Facts, Inc., et cetera?

[35] A You mean as to what type of work they do?

Q not what type of work they do; whether or not they are subcontractors or what?

A Well, they are all subcontractors.

Q Those are all subcontractors?

A All underneath the Washington Metropolitan Area Transit Authority.

Q That's not my question.

Subcontractors to do what?

A Specified work, I assume.

Q Those companies are speciality companies, aren't they, as opposed to general construction companies?

A I have no idea whether District Utilities is a specialty company or not. They could be a general contractor on some other project. On this particular project they may not be. When I say "another project," let's say for the Washington Sanitary Commission, they can be a general contractor. I don't know what they do.

* * *

[36] Q Would it be correct, Mr. Sewall, that your knowledge or basis for your knowledge in the affidavit and in your testimony today as to what Ball-Healy is or what Tunnel Electric is, What Geo-Facts, Inc., is, is based [37] upon the code numbers that are in front of you today?

A Basically, yes. I would have to—whether it is these code numbers or any of the code numbers on any of the various pages, as I stated earlier, it would be impossible to know any one of these off the top of my head.

Q Those code numbers were set forth by MIA; is that your understanding?

A It is my understanding that Metro Insurance Administrators assigns these numbers, yes.

Q And the reason for assigning these numbers next to these companies is what?

A Is to indicate that these various companies have been issued an insurance certificate.

Q So you don't know, is it correct—and correct me if I am wrong—you don't know whether or not, based upon these numbers or from your own personal knowledge, whether or not Ball-Healy-Granite is a general contractor or a subcontractor; is that correct, sir?

A The only thing I know is that the code number given to Ball-Healy and Granite is that they are the prime contractor.

Q Because they are the first outfit that entered [38] into a contract on A-6b?

A Correct. They have the lowest number.

Q Well, let's go back a little bit here. Your definition of a prime contractor is what?

A As I stated earlier, a prime means first, and, therefore, a prime contractor would mean a first contractor.

Q But you don't have any independent knowledge, sir, other than these code numbers which are inhouse code numbers of Johnson and Higgins?

A Metro Insurance Administrators.

Q That's an arm of the brokerage firm which is Johnson and Higgins?

A This is correct.

Q Those are inhouse code numbers that are the product of Johnson and Higgins, which is an insurance brokerage company in New York City that uses a local office called MIA, Metro Insurance Administrators, not to be confused with Metro, to designate when contracts were entered into on a specific job site; is that correct?

A I don't know whether that designates what you just said. Are you trying to say that these code numbers—is it my understanding that these code numbers designate [39] when a contract was entered into?

Q The order of that company entering into a contract on A-6b, let's just talk about A-6b.

A The order, yes, not when. I would have to [sic] idea when any one of those contracts were entered into.

Q You don't have any knowledge as to whether or not Ball-Healy and Granite entered into contracts with some of the names or all of the names under it, do you?

A I have no personal knowledge of that, no.

Q So when you say that Ball-Healy-Granite is a prime contractor, that is based upon the numbers of Johnson and Higgins, because Ball-Healy-Granite is the first name that appeared there?

A This is correct.

Q And by your definition you call that a prime contractor rather than a general contractor?

A This is correct.

MR. HANNY: Excuse me a second.

(Pause.)

MR. HANNY: I have nothing else.

THE WITNESS: Thank you.

EXAMINATION BY COUNSEL FOR THE DEFENDANT

[40] BY MR. COHEN: (resumed)

* * *

[41] Q Let's try to clarify—I understand this exhibit with numbers—you used the term in paragraph 4 that in essence said that Stanley Wilmes worked for subcontractors; and I assume when you searched your files, you found that one of the subcontractors, as you called it, was Ball-Healy and Granite; is that not correct at that time?

A This is correct.

Q And the term in your method of thinking, you consider Metro or WMATA a general contractor because they have responsibility for the construction of the whole system; is that correct?

A This is what I stated originally, that they have ultimate responsibility as far as my understanding.

Q You consider everyone else Metro contracts with a subcontractors?

A This would be correct.

Q Because they don't have the responsibility for [42] the construction of the whole system; is that not correct?

A This would be correct.

Q Has anything come to your attention that has led you to believe that Ball-Healy-Granite has the responsibility for the construction of the whole systems [sic]?

A No.

* * *

[43] Q You consider a company who contracts with WMATA a sub because they are under the general direction and control of WMATA; is that not correct?

A This is correct.

Q So forget these numbers for a moment. If WMATA contracted with Ball-Healy and Granite, District Utilities, Geo-Facts, Inc., Western, Inc., on down the line, you would consider each of those companies a sub of the general WMATA?

A This would be correct.

Q Because WMATA has the overall responsibility for constructing the entire system?

A This is correct.

Q It is your understanding that this system is being built by a series of contractors, and there may be subs to subs to subs, or are you aware of that?

A I am aware that it is being [sic] by a number of contracts, and that there may be subcontractors to the subs to the subs. [44] This is the reason for the CIP insurance, to make sure that everyone is insured, even the lowest of subs.

Q And the compensation insurance that we are talking about was compensation insurance purchased by Metro, the Washington Metropolitan Area Transit Authority; is that not correct?

A This is my understanding. I have seen premium checks from them in excess of a million dollars, so I guess they are the ones that are paying for it.

Q Have you ever seen a premium check from Ball-Healy and Granite?

A No.

Q When you had your conversation with Mr. Cohen and Mr. Cave on that day, and I am dealing with our conversation with you, Mr. Sewall, were you in essence told to tell the truth?

A That's what I was told.

Q Is that what you have done here today?

A This is what I have done.

Q Did Mr. Cohen and Mr. Cave or anyone associated with Metro or Hogan and Hartson tell you how to define general contractor?

[45] A No.

Q Did they tell you how to define subcontractor?

A No. If they did, I would use my own definition.

Q And the definitions you are giving here today and the definitions in your affidavit are to the effect that Metro is the general contractor because they have to construct the whole system; and when the contract with someone to do a portion of work on it, they are a subcontractor?

A This would be my definition, yes.

Q And the only reason you are using the term "prime" contractor this afternoon is because Mr. Hanny gave you something marked Plaintiff's Exhibit No. 2, which had a series of numbers on the left, and the first number listed was Ball-Healy and Granite; is that correct?

A This would be basically correct, yes.

Q So, therefore, if Tunnel Electric was listed number one, and Ball-Healy was down where Tunnel Electric was, you would call Tunnel Electric the prime?

A This would be correct.

Q If something called Peter Bratti, which is listed at the bottom of page 13, instead was listed up where Ball-Healy and Granite was, you would call Peter Bratti the prime [46] contractor; is that not correct?

A This would be correct.

Q But when you are talking about overall supervision and control, then in your opinion you are talking about the general contractor?

A This would be correct. I am talking about somebody who has the control to shut the job down or what-have-you. They are the ones who are ultimately responsible for the entire job.

Q And you consider that the general contractor has to be responsible for the entire job from the beginning to the end?

A This is my understanding of a general contractor, yes.

Q And the contract that Ball-Healy and Granite had that was let by Metro dealt with one site in turn on the whole system; is that not correct?

A This is correct.

Q Well, it really dealt with three sites, as I understand it, but it did not deal with the whole system?

A No. It dealt with one small segment called the A-6b contract. I believe it was three stations altogether.

* * * *

[47] FURTHER EXAMINATION BY
COUNSEL FOR THE PLAINTIFF

BY MR. HANNY:

* * * *

Q I think you have answered it.

Are you of the opinion, sir, that a prime contractor [48] is different from a general contractor?

A I think you asked that earlier, and I would have to say yes, I think they are. In essence they would be different. They may have more responsibility or less responsibility than a general contractor or more responsibility, depending upon where you are putting it and what you are calling what.

Q Are you of the opinion, sir, that a prime contractor is different from a subcontractor?

A What do you mean exactly? According to what I stated earlier, the prime contractor on any particular project is in my understanding the first contract that was let on that particular project.

In other words, the prime contract for the A-6b project was Ball-Healy and Granite, the joint venture. Are you saying are they different than any of the other subcontractors?

Q My question is: Do you think that there is a difference between a prime contractor and a subcontractor?

MR. COHEN: I am going to object unless you put it—

THE WITNESS: Well, I just asked, are you asking me whether there is any difference between them and any other [49] subcontractor? I guess my answer then would probably be they may have a little bit more responsibility in one essence, but depending upon what their contract was. I have no idea of the wording of their contract.

BY MR. HANNY: (resumed)

Q But is it your general understanding—since you signed the affidavit—that a prime contractor is different than a subcontractor?

A I think I answered that, Mr. Hanny. I said they are—I believe I stated that they are really no different than any other really [sic] subcontractor. They are a subcontractor to the Authority to build the entire subway system, their particular segment of it. They may have a little bit more responsibility. I don't know how else you want me to tell you that.

Q Mr. Sewall, can there be, to your knowledge, a general contractor on a specific project which is part of an overall project? In other words, let me give you an example. Let's say that an entity, any entity, governmental entity, quasi governmental entity, or a large corporation, wanted to build a very, very large project, the TVA project, anything large, is it your understanding that there would be [50] several general contractors that would be utilized to build such a massive project?

MR. COHEN: Let me just object to that hypothetical, because there has been no predicate laid that this man is familiar with other massive construction projects. He has given his definition of why he used the term subcontractor in his affidavit.

To ask him a hypothetical about projects that don't even exist, I think is unfair to this witness unless you

can qualify him as an expert in the construction industry, which I don't think he testified.

He is basically a claims manager in Fairfax, Virginia, for NATLSCO. The court order was not to ask him hypotheticals about various hypothetical situations.

With that said, you can certainly question him.

THE WITNESS: Would you repeat the question?

BY MR. HANNY: (resumed)

Q In a very large project—let's be even more specific, let's talk about the Metro rapid rail project here in Washington, could there be several general contractors hired to build a system as large and as complex as the one here?

MR. COHEN: Let me—just a minute, sir. Let [51] me just object. He has already answered that question. He said if the general contractor has responsibility for building a system from beginning to end, they are the general contractor. Therefore, if there is a fact that there is more than one person or entity that should build that system from beginning to end, we will stipulate that there are [sic] more than one general contractor, but there isn't.

I think he has answered it but go ahead.

THE WITNESS: As I was about to say, there can be a number of contractors hired as they are hired. The sheet here, I suppose, has over a thousand different contractors listed on it to aid in building the subway system. If you want to call them all general contractors, go ahead. I call them all subcontractors.

BY MR. HANNY: (resumed)

Q Under your definition could there be numerous prime contractors to build a WMATA rapid rail system?

MR. COHEN: Let me object on the grounds that his definition of prime is listed on that list No. 1, and obviously I think that we are really wasting the Court's time, because that is a list of numbers, not a definition.

MR. HANNY: That's precisely my point. That they [52] are not the classification.

THE WITNESS: I look at 11901000, Williams Enterprises, Inc., they are a prime contractor.

I look at 12001000, CDPC Construction Company, they are a prime contractor, according to this list. I look at 13001000, Otis Elevator Company, they are a prime contractor.

I look at 13401000, Truland Corporation, they are a prime contractor. Yes, there can be a number of prime contractors on a project.

BY MR. HANNY: (resumed)

Q And you distinguished a prime contractor from a general contractor?

A The prime contractor is the first contractor issued a contract on any specific segment of the project.

Q Under the wrap-up insurance program that came into existence in October 1971, which still exists today, could a company such as Ball-Healy-Granite purchase their own insurance and not come under the umbrella of wrap-up insurance if they wanted to?

A They could.

* * * *

[54] FURTHER EXAMINATION BY
COUNSEL FOR THE DEFENDANT

BY MR. COHEN:

Q Mr. Sewall, you have not read the contract between Ball-Healy and Granite and WMATA; is that not correct?

[55] A This is correct. I have not read it.

Q Therefore, you don't know actually what Ball-Healy and Granite could do on that project in relation to what they have contracted with WMATA; is that not correct?

A This is correct.

Q When you responded to Mr. Hanny's question about, sure, they could shut down their own project, you were

basically guessing, because you don't know what they can or cannot do under the contract; isn't that correct?

A I would have to say yes, I was guessing. As any individual would have responsibility over their own employees, they could definitely shut down the job if there is safety violations involved.

Q But if Metro had the right to shut down the job, would you consider Metro, if they shut down the job even though Ball-Healy and Granite wouldn't want it shut down, would then Metro have more control over the job site than Ball-Healy and Granite?

A I would consider that Metro would then be in a superior position.

MR. COHEN: I have no further questions.

* * * *

[57] CERTIFICATE OF THE DEPONENT

I have read the foregoing pages 3 through 56, inclusive, and find the answers to the questions therein contained to be true and correct, with the exception of changes, if any.

DAVID L. SEWALL

Dated: _____

CERTIFICATE OF NOTARY PUBLIC

SUBSCRIBED AND SWORN TO BEFORE ME this

_____ day of _____, 19__.

(Name)

Notary Public in and for
the District of Columbia

My Commission Expires:

[58] CERTIFICATE OF NOTARY PUBLIC

I, NORMA NASUTI COSTELLO, a Notary Public in and for the District of Columbia, before whom the foregoing deposition was taken, do hereby certify that the witness whose testimony appears in the foregoing deposition was duly sworn by me; that the testimony of said witness was taken by me in Shorthand at the time and place mentioned in the caption hereof and thereafter reduced to typewriting under my supervision; that said deposition is a true record of the testimony given by said witness; that I am neither counsel for, related to, nor employed by any of the parties to the action in which this deposition was taken; and, further, that I am not a relative or employee of any counsel or attorney employed by the parties hereto, nor financially or otherwise interested in the outcome of this action.

/s/ Norma Nasuti Costello
NORMA NASUTI COSTELLO
Notary Public in and for
the District of Columbia

My commission expires:

August 14, 1984

SUPREME COURT OF THE UNITED STATES

No. 83-747

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY,
Petitioner,

v.

PAUL D. JOHNSON, *et al.*

ORDER ALLOWING CERTIORARI

Filed January 16, 1984

The petition herein for a writ of certiorari to the *United States Court of Appeals for the District of Columbia Circuit* is granted.

A true copy

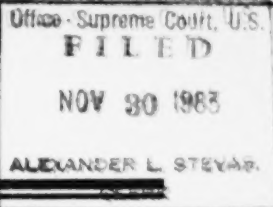
ALEXANDER L. STEVAS

Test:

Clerk of the Supreme Court
of the United States

By /s/ Christopher W. Vasil
Deputy

No. 83-747



IN THE
Supreme Court of the United States
OCTOBER TERM, 1983

WASHINGTON METROPOLITAN AREA
TRANSIT AUTHORITY,
Petitioner,

v.

PAUL D. JOHNSON, *et al.*,
Respondents.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The District Of Columbia Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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(i)

QUESTION PRESENTED

Whether a general contractor obtains an employer's immunity from actions for negligence under §5(a) of the Longshoremen's and Harbor Worker's Compensation Act by injured employees of the general contractor's subcontractors, when the general contractor has secured workers' compensation coverage for all its subcontractors under a "wrap-up" insurance plan.

TABLE OF CONTENTS

	<u>Page</u>
QUESTION PRESENTED	i
OPINIONS BELOW	1
JURISDICTION	2
RELEVANT STATUTES	2
STATEMENT OF THE CASE	3
SUMMARY OF ARGUMENT	5
REASONS WHY THE PETITION SHOULD BE DENIED	12
I. THE QUESTIONS PRESENTED FOR THIS COURT'S CONSIDERATION BY THE PETITIONER CONTAIN FUNDAMENTAL MISSTATEMENTS OF THE APPLICABLE IMMUNITIES CONFERRED BY §§904 AND 905A	7
II. THE CIRCUIT COURT DECISIONS ARE IN TOTAL HARMONY THAT A GENERAL CONTRACTOR IS A THIRD PARTY UNDER §933(a) VIS A VIS AN INJURED EMPLOYEE OF A SUBCONTRACTOR	9
III. PETITIONER'S REMAINING ARGUMENTS HAVE NO MERIT	11
A. WMATA'S WRAP-UP PLAN HAS NOT BEEN DECLARED VOID	11
B. NEW YORK LAW DOES NOT IMMUNIZE A GENERAL CONTRACTOR FROM SUIT BY EMPLOYEES OF SUBCONTRACTORS	11
C. PETITIONER'S ARGUMENT THAT THE RESULT IS UNMANAGEABLE IS MERITLESS	12

	<u>Page</u>
D. THE REMAINING LEGAL ISSUES SHOULD BE DECIDED BY THE TRIAL COURT	12
CONCLUSION	13

TABLE OF AUTHORITIES

Cases:

<i>DiNicola v. George Hyman Construction Co.,</i> 407 A.2d 670 (D.C. 1979)	5, 8, 9, 10
<i>Edwards, et al. v. Bechtel Associates Professional Corp., et al.,</i> (Slip Opinion of District of Columbia Court of Appeals, August 31, 1983)	4, 8, 11
<i>Fiore v. Royal Painting Company, Inc.,</i> 398 So.2d 863 (Fla. App. 1981)	5, 8, 10
<i>Lindler v. District of Columbia,</i> 502 F.2d 495 (D.C. Cir. 1974)	9
<i>Miller v. Northside Danzi Construction Co., et al.,</i> 629 P.2d 1389 (Alaska 1981)	5, 8, 9
<i>Probst v. Southern Stevedoring Company,</i> 379 F.2d 763 (5th Cir. 1967)	5, 8, 9, 10
<i>Sweezy v. Arc Electrical Construction Co.,</i> 295 N.Y. 306, 67 N.E.2d 369 (1946)	11
<i>Thomas v. George Hyman Construction Co.,</i> 173 F. Supp. 381 (D.D.C. 1959)	5, 8, 10

Statutes and Rules:

28 U.S.C. §1254 (1976)	2
28 U.S.C. §2101(c) (1976)	2

Page

Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §§901-952 (1976)	i
33 U.S.C. §904(a) and (b) (1976)	3, 4, 7, 8, 10
33 U.S.C. §905(a) (1976)	3, 4, 5, 7
33 U.S.C. §932(a) (1976)	2
33 U.S.C. §933(a) (1976)	2, 5, 9
33 U.S.C. §934(a) (1976)	2
33 U.S.C. §935 (1976)	2
33 U.S.C. §936 (1976)	2
33 U.S.C. §938 (1976)	2
Section 80 of the Washington Metropolitan Area Transit Authority Interstate Compact (Pub. L. No. 89-774, 80 Stat. 1324 (1966))	2, 6, 7, 12
District of Columbia Code §36-501	2
Miscellaneous:	
Washington Metropolitan Area Transit Authority's Coordinated Insurance Program	3, 4, 6, 8, 10, 11
APPENDIX A	
Opinion and Judgment of the District of Columbia Court of Appeals Affirming the Summary Judgment of the Superior Court of the District of Columbia	1a

**IN THE
Supreme Court of the United States
OCTOBER TERM, 1983**

No. 83-747

**WASHINGTON METROPOLITAN AREA
TRANSIT AUTHORITY,**

Petitioner,

v.

PAUL D. JOHNSON, et al.,

Respondents.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The District Of Columbia Circuit**

RESPONDENT'S BRIEF IN OPPOSITION

Respondents respectfully request that this Court deny the Petition for Writ of Certiorari to review the unanimous decision of the United States Court of Appeals For the District of Columbia Circuit in this matter.

OPINIONS BELOW

The decisions of the United States District Court for the District of Columbia, not officially reported, appear as Petitioner's Appendices A-G. The decision of the District Court denying plaintiffs' motions for post judgment relief

under Fed. R. Civ. P. 59(e) and 60(b)(3), not officially reported, appear as Petitioner's Appendices H-L. The decision of the United States Court of Appeals for the District of Columbia Circuit, not yet officially reported, appears as Petitioner's Appendix M. The orders of the Court of Appeals denying a Petition for Rehearing and a Suggestion for Rehearing En Banc, not officially reported, appear as Petitioner's Appendices N and O. The Court of Appeals' Order staying issuance of its mandate to November 7, 1983 pending the filing of a petition for a writ of certiorari, not officially reported, appears as Petitioner's Appendix P.

JURISDICTION

Petitioner seeks to invoke the jurisdiction of this Court pursuant to 28 U.S.C. §1254(1). Respondents agree with the applicability of that provision. Respondents further agree that the Petition has been timely filed under Rule 11 of the Rules of this Court and pursuant to 28 U.S.C. §2101(c).

RELEVANT STATUTES

Respondents agree that the relevant statutory provisions include the following, set forth by petitioners:

District of Columbia Code §36-501.

United States Code Title 33, §§904(a) and (b) and 905(a).

Respondents also cite:

United States Code Title 33, §932(a).

United States Code Title 33, §933(a).

United States Code Title 33, §934.

United States Code Title 33, §935.

United States Code Title 33, §936.

United States Code Title 33, §938.

Section 80 of the Washington Metropolitan Area Transit Authority Interstate Compact (Pub. L. No. 89-774, 80 Stat. 1324 (1966)).

Respondents do not agree that other provisions cited by petitioners are relevant to the issues presented.

STATEMENT OF THE CASE

A. Introduction

The sole issue in these seven cases, consolidated for appeal by the United States Court of Appeals for the District of Columbia Circuit, is whether a general contractor, ordinarily considered a third party for purposes of suit by injured employees of subcontractors under the Longshoremen's and Harbor Workers' Compensation Act, becomes an immunized employer under 33 U.S.C. §905(a) where the general contractor provides compensation coverage for all its subcontractors on a project under a so-called wrap-up insurance program. The heart of petitioner's argument is that because it set in place the wrap-up insurance plan to cover all its subcontractors, it is entitled to the "quid pro quo" immunity that the statute provides for employers who comply with the statutory obligation of employers to secure compensation coverage for their employees. 33 U.S.C. §§904 and 905(a). At the trial level five judges agreed that immunity should convey to the party that pays for it, and granted petitioner's motions for summary judgment. The lower court decisions, however, in adopting petitioner's rationale, either implied or stated openly that under the unique circumstances herein, the actual em-

employers were not immune from suit because these employers did not secure their own compensation insurance while the Washington Metropolitan Area Transit Authority (WMATA), normally a third party subject to suits for negligence, became the immunized employer by virtue of his providing compensation coverage to its subcontractors. See Petitioner's Appendices B at 11a, footnote 2, and C at 17a-18a. The Court of Appeals for the District of Columbia reversed, holding that WMATA was under no legal duty to institute the wrap-up plan, and thus WMATA was not entitled to the immunity of an employer under 33 U.S.C. §905(a). The Court declined to express an opinion as to whether the subcontractor-employers had "secured" compensation insurance under §904(a) under the wrap-up plan (Decision at 20, footnote 16). But, it should be noted at the outset that the only appellate case law in the District of Columbia on that issue stands for the proposition that WMATA's subcontractor-employers have secured compensation insurance for their employees by participating in petitioner's wrap-up plan and are thus entitled to §905(a) quid pro quo immunity from suit. *Edwards et al. v. Bechtel Associates Professional Corp., D.C., et al.* (D.C. decided August 31, 1983), petition for certiorari denied Nov. 28, 1983. Respondent's Appendix A.

B. WMATA and the Wrap-Up Plan

What is termed Phase I of WMATA's subway construction project commenced on December 9, 1969 was the beginning of construction. On all WMATA construction contracts entered into from that time up until July 30, 1971, WMATA's contractors secured their own workers' compensation insurance. Phase II of WMATA's subway construction commenced on July 30, 1971 with the introduction of the Coordinated Insurance Program (wrap-

up insurance). WMATA selected Lumberman's Mutual Casualty Company, a Kemper subsidiary, to provide the system wide insurance for all contractors engaged in subway construction. Another Kemper subsidiary, National Loss Control Service Corporation, was engaged to adjust all compensation and liability claims and also to provide certain jobsite monitoring services. The inauguration of the wrap-up plan coincided with the selection of the Bechtel Corporation as the system wide engineering and safety consultant to WMATA for all subway construction contracts entered into after July 30, 1971.

SUMMARY OF ARGUMENT

This petition should be denied for a number of reasons. Petitioner's Presentation of the Questions Presented herein fundamentally misstates the immunity conferred by §905(a) of the Longshoremen's and Harbor Workers' Compensation Act. All the prevailing cases interpreting the LHWCA unanimously hold that a general contractor is a third party subject to a suit for negligence under 33 U.S.C. §933(a) by an injured employee of a subcontractor. *Probst v. Southern Stevedoring Company*, 379 F.2d 763 (5th Cir. 1967); *DiNicola v. George Hyman Construction Co.*, 407 A.2d 670 (D.C. 1979); *Miller v. Northside Danzi Construction Co. et al.*, 629 P.2d 1389 (Alaska 181); *Fiore v. Royal Painting Company, Inc.*, 398 So.2d 863 (Fla.App. 1981); *Thomas v. George Hyman Construction Co.*, 173 F.Supp. 381 (D.D.C. 1959). The United States Court of Appeals for the District of Columbia has, in the decision below, reaffirmed what every appellate court that has considered the question posed herein has held: the statute imposes a legal duty to secure compensation on employers primarily and on general contractors only secondarily. Petitioner therefore cannot claim the im-

munity of an employer simply by imposing the nature of the insurance arrangement for any given construction project. The only relevant legal status asserted by the petitioner is that of general contractor, and its injection of the word "builder," not included in its arguments below, is irrelevant.

The petitioner cannot point to any conflict in the Circuit Court decisions on this issue. It instead asks this Court to overrule every legal precedent in existence and to award it immunity in exchange for making a purely business decision. Granting a petition for this purpose would work untold damage to principles of "stare decisis" and would only encourage a substantial increase in future petitions for certiorari.

The Petitioner's reliance on the New York statutory scheme is misplaced, since under New York case law a general contractor is a third party subject to suit by employees of its subcontractors.

The Court of Appeals decision does not necessarily inhibit the future operation of wrap-up insurance. The Court did not opine on whether the subcontractor-employers have secured compensation insurance, which is the only real novel issue arising out of this scenario. It is plain that to comport completely with statutory requirements all WMATA must do is require its subcontractors to participate in the payment of the premiums for the insurance coverage.

The result reached below is not unmanageable, as argued by the Petitioner. Section 80 of the Washington Metropolitan Area Transit Authority Interstate Compact, Pub. L. No. 89-774, 80 Stat. 1324 (1966) clearly and unreservedly renounces any and all immunities the petitioner may have under the laws of the District of Colum-

bia, Maryland and Virginia for proprietary functions. The state workmen's compensation statutes of Maryland and Virginia do not apply to WMATA because Section 80, as federal law, is superior and preempts any claim of immunity under those state statutes. Further, the LHWCA's provisions apply to all of WMATA's subway projects because of the many jurisdictional contacts with the District of Columbia, and that compensation statute's third party provisions will apply. In any event, these issues are not before this Court, and will be raised at the trial level in due course.

Finally, WMATA's arguments, sprinkled liberally with "facts" not contained in the record, attempt to prophesy a mountain of potential litigation if this Court does not reinterpret §§904 and 905(a) to the liking of the petitioner. The arguments are absurd as there has been relatively little WMATA subway construction since 1980 and the statute of limitations is of course a bar to stale claims.

Therefore, the arguments of the petitioner are completely without merit and the petition must be denied.

REASONS WHY THE PETITION SHOULD BE DENIED

I. The Questions Presented For This Court's Consideration By The Petitioner Contain Fundamental Misstatements Of The Applicable Immunities Conferred By §§904 And 905(a).

With regard to the Petitioner's first question presented, three fundamental misstatements of law appear: first, there is absolutely no legal obligation contained anywhere in the WMATA Compact requiring it to provide workers' compensation benefits for the contractors it contracts with

to perform construction work on WMATA's subway project. Thus WMATA's initiation of the wrap-up plan in 1971 was not, as Petitioner presents to this Court, "pursuant to its obligation under a federally-approved interstate Compact" Secondly, the LHWCA does not, as stated by petitioner, immunize contractors on a project, but rather only the employer of the injured worker who happens, on a construction job, to be a contractor. All other contractors on the same job, including the general contractors, are third parties and are potentially liable for damages to the injured worker for tortious conduct that proximately causes the worker's injuries. *Probst v. Southern Stevedoring Company, supra*; *DiNicola v. George Hyman Construction Company, supra*; *Miller v. Northside Danzi Construction Company, et al., supra*; *Fiore v. Royal Painting Company, Inc., supra*; *Thomas v. George Hyman Construction Company, supra*.

Finally, petitioner states that the United States Court of Appeals below has held that injured workers on WMATA's subway project are receiving compensation benefits from WMATA by virtue of the wrap-up plan in effect. In fact the Court avoided deciding that issue, leaving open the question of whether WMATA's subcontractors have secured the compensation coverage for their employees. Decision at 20, footnote 16. If the subcontractors have so complied, then the benefits are deemed to flow from the insurance carrier on behalf of the subcontractors, not the petitioner herein. The District of Columbia Court of Appeals has recently held just that in the case of *Edwards et al. v. Bechtel Associates Professional Corp., D.C., et al., supra* (App. A.). Thus, the only appellate decision on this point holds that wrap-up insurance satisfies a subcontractor's obligation to secure compensation under §904(a), entitling it to the employer immunity the statute anticipates.

Petitioner herein, as a general contractor, remains a potentially liable third party. *DiNicola v. George Hyman Construction Co., supra.*

With regard to the Petitioner's second question presented, respondents submit that the question misstates the immunity of the "builder," a question that is irrelevant in this context anyway since the petitioner's claim to immunity below was based on its status as "general contractor." There is not a single decision granting immunity to a builder under the LHWCA, and the builder, be he an owner (see *Lindler v. District of Columbia*, 502 F.2d 495 (D.C. Cir. 1974)) or a general contractor (see *DiNicola v. George Hyman Construction Company, supra*), remains a third party subject to suit under the Act. Thus the "builder" forfeits no immunity by purchasing workers' compensation protection for its contractors since it never had it. A builder, like a general contractor, cannot forfeit an immunity it never had. Neither can it obtain immunity it ordinarily does not have merely by arranging to purchase compensation insurance for its contractors.

II. The Circuit Court Decisions Are In Total Harmony That a General Contractor Is A Third Party Under §933(a) Vis A Vis An Injured Employee Of A Subcontractor.

All the appellate Courts that have considered the question have held that only the employer-subcontractor has the legal obligation to secure compensation insurance for his employees, and only it is entitled to the "quid pro quo" immunity from suit that the statute envisions. *Probst v. Southern Stevedoring Company, supra; DiNicola v. George Hyman Construction Company, supra; Miller v. Northside Danzi Construction Company et al., supra;*

Fiore v. Royal Painting Company, Inc., supra; Thomas v. George Hyman Construction Company, supra.

Prior to the start of the wrap-up insurance on July 30, 1971, WMATA must admit that it was without any claim to statutory immunity. With the institution of the wrap-up plan, WMATA informed prospective builders not to include the cost of insurance in their bids since all coverage would be provided by WMATA. Petitioner claims, in a nutshell, that this business decision, made for financial and administrative reasons, gives it as an incidental benefit, immunity from suit. This is because it was the "general contractor" for the project, and all the contractors with whom it contracts are "subcontractors" within the meaning of §904(b). The United States Court of Appeals for the District of Columbia below has only restated the unanimous interpretation of §904(b) by the Fifth Circuit Court of Appeals in *Probst v. Southern Stevedoring Company, Inc.* and The District of Columbia Court of Appeals in *DiNicola v. George Hyman Construction Co., supra*, in rejecting this self-serving proposition. Since the employer-subcontractor has the primary duty to secure compensation coverage for its employees under §904, only it is entitled to the "quid pro quo" immunity for securing the compensation coverage. WMATA, by preempting the subcontractors' primary legal duty beginning in 1971, does not thereby become inheritor of the subcontractor's statutory immunity. That is just plain common sense, and that is the only holding of the Court below.

It is to be noted that the Court did not decide the only novel issue tangentially involved herein, that is, whether the subcontractors retain their immunity by participating in WMATA's Coordinated Insurance Program. The only appellate opinion on this issue holds that the subcontractors do retain their immunity under WMATA's wrap-up

plan. *Edwards, et al. v. Bechtel Associates Professional Corp., D.C., et al., supra*, (Appendix A). Thus, at the present time the Courts' holdings leave the parties in the precise situation they were in under Phase I (pre wrap-up) of the WMATA subway construction project. This being the case, there is hardly any reason for granting the Petition for Certiorari.

III. Petitioner's Remaining Arguments Have No Merit.

A. WMATA's Wrap-Up Plan Has Not Been Declared Void.

The Court's decision below only states that WMATA has pre-empted its contractor's primary statutory duty and that the wrap-up plan "deviates" from the requirements of the statute. It is clear, however, that WMATA may select the carrier that its bidders must do business with. All that is legally required to fully comply with the statute is that the contractors, and not WMATA, pay the premium for this insurance. Surely this can be done if the Petitioner wishes to comply fully with the requirements of the law.

B. New York Law Does Not Immunize A General Contractor From Suit By Employees Of Subcontractors.

Contrary to the unstated implications of Petitioner's Brief, a general contractor is not entitled to immunity from suit by an injured employee of a subcontractor under the New York Workmen's Compensation Law. *Sweezy v. Arc Electrical Construction Co.*, 295 N.Y. 306, 67 N.E.2d 369 (1946). Petitioner's reliance on the intent of the architects of the New York Law regarding immunity is thus refuted by that state's case law, and is misplaced.

C. Petitioner's Argument That The Result Is Unmanageable Is Meritless.

WMATA contends that the result of the Court below could lead to thousands of lawsuits. This argument, irrelevant in any case, is simply meritless. Few WMATA projects have been under construction since 1980, and the statute of limitations has long since run on most accidents even where negligence could have been involved. The figures cited by the petition do not appear in the record on appeal and were mentioned for the first time in Petitioner's Motion For Rehearing and Suggestion For Rehearing En Banc, before the Court below. The petition should not be granted based on such doomsday arguments.

D. The Remaining Legal Issues Should Be Decided By The Trial Court.

Petitioner suggests that the result below will create anomalous results. However, the argument is conclusory and WMATA presumes its forthcoming motions before the trial court below will be resolved in its favor. It is by no means certain that the laws of Maryland and Virginia will immunize the petitioner from negligence suits by employees of subcontractors for accidents occurring in those jurisdictions. Choice of law, rules, the absolute waiver of immunity contained in §80 of the Compact, and the interpretation of the Maryland and Virginia statutes are all issues that will shortly be dealt with by the trial court. The fact that there remain outstanding legal issues below does not constitute grounds for granting the petition.

CONCLUSION

For the reasons stated above, it is respectfully submitted that the Petition for Certiorari should be denied.

Respectfully submitted,

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APPENDIX A

DISTRICT OF COLUMBIA COURT OF APPEALS

Nos. 82-365 and 82-1078

LYLE EDWARDS, ET AL. (No. 82-365),

and

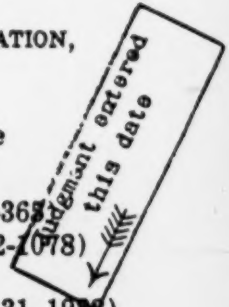
DARWIN H. SMITH (No. 82-1078), APPELLANTS,

v.

BECHTEL ASSOCIATES PROFESSIONAL CORPORATION,
D.C., ET AL., APPELLEES.

Appeal from the Superior Court of the
District of Columbia

(Hon John F. Doyle, Trial Judge, No. 82-365)
(Hon. Carlisle E. Pratt, Trial Judge, No. 82-1078)



(Argued April 21, 1983

Decided August 31, 1983)

William F. Mulroney, with whom *James M. Hanny* and *Michelle A. Parfitt* were on the briefs, for appellants.

James W. Greene, with whom *Gary W. Brown* and *Catherine H. Lesica* were on the briefs, for appellees.

Before NEBEKER, BELSON, and TERRY, Associate Judges.

NEBEKER, Associate Judge: This consolidated appeal arises out of third-party negligence actions initiated in the Superior Court of the District of Columbia by appellants against Bechtel Associates Professional Corporation

("Bechtel"). In both cases, the trial court granted Bechtel's motion for summary judgment and these appeals followed. Because the six-month period for bringing the actions under the Longshoremen's and Harbor Workers' Act expired, we affirm.

I.

Appellant Lyle Edwards was an underground superintendent for Ball-Healy-Granite, a contractor for the Washington Metropolitan Area Transit Authority's ("WMATA") construction of the Metro subway system. He began his work in August 1976. At all pertinent times, Bechtel was the safety engineering consultant to WMATA at its construction sites.

In 1978, Edwards received a medical report from his physician stating that his exposure to underground dusts and fumes had worsened a lung condition. Subsequently, in January 1979, appellant filed a worker's compensation claim with his employer. On April 1, 1980, a compensation award was entered. Thereafter, on April 27, 1981, appellant brought this third-party negligence action against Bechtel alleging that Bechtel had failed to provide a safe and healthy working environment.

Appellant Darwin Smith was an Assistant General Superintendent with the Joint Venture, Fruin-Colnon, a contractor working on the Bethesda Metro station for WMATA. As noted above, Bechtel was the safety and engineering consultant to WMATA. Smith began his work in May 1978.

In November 1978, Smith received a medical report from his physician noting that he had contracted a serious respiratory illness through his exposure to toxic dust and fumes on the contract site. Subsequently, he filed a worker's compensation claim with his employer, and then

received a formal award of compensation on May 20, 1980. Thereafter, on November 17, 1981, he brought this third-party negligence suit against Bechtel, alleging that Bechtel had failed to provide a safe and healthy working environment.

In both of these cases, the trial court granted appellees' motion for summary judgment because the six-month period for bringing the third-party negligence action had elapsed.¹

II.

Appellants assert that the trial court erred when it held that § 933 of the Longshoremen's and Harbor Workers' Act ("the Act")² barred them from asserting a third-party claim against appellees, and assigned all their rights thereunder to their respective employers. Appellants raise several issues. We address each in turn.³

¹ Section 933 of the Longshoremen's and Harbor Workers' Act (33 U.S.C. § 901 *et seq.* (1976)) states in pertinent part:

(b) Acceptance of such compensation under an award in a compensation order filed by the deputy commissioner or [Benefits Review] Board shall operate as an assignment to the employer of all right of the person entitled to compensation to recover damages against such third person unless such person shall commence an action against such third person within six months after such award.

² See note 1, *supra*.

³ One claim, which we hold does not merit substantive discussion, is that appellants' failure to timely bring their negligence actions is excused by the fact that the compensation carrier failed to disclose the existence of dangerous worksite conditions. This argument is meritless. In fact, any duty owed runs to the named insured (the employer) and not individual claimants.

A.

Initially, appellants argue that their respective employers did not "secure" compensation insurance within the meaning of the statute⁴ (see § 904(a) of the Act), so as to allow them the benefit of assignment of the employees' right to sue. Appellants note that their employers may now pursue third-party actions as reimbursement for their losses⁵ without having secured the compensation insurance which pays over benefits to injured employees. While we agree that there is an implied statutory *quid pro quo* between securing compensation insurance and assignment to an employer of the right to sue, we believe that appellants' employers did "secure" compensation insurance within the meaning of the statute. Notwithstanding that WMATA paid for the insurance, appellants' employers did secure the compensation payments under the terms of their contracts with WMATA. Further, compensation claims were made with appellants' employers and against their named policies. We are satisfied, therefore, that the statutory requirement has been met.⁶

⁴ Section 904(a) states in pertinent part:

Every employer shall be liable for and shall secure the payment to his employees of the compensation payable under sections 907, 908, and 909 of this title. In the case of an employer who is a subcontractor, the contractor shall be liable for and shall secure the payment of such compensation to employees of the subcontractor unless the subcontractor has secured such payment. (Emphasis added.)

⁵ See § 933(b) of the Act.

⁶ Neither do we believe that WMATA violated statutory dictate through the purchase of umbrella insurance coverage for all of its subcontractors.

B.

Appellants preface their next contention by asserting that the Supreme Court decision in *Rodriguez v. Compass Shipping Co.*, 451 U.S. 596 (1981), is not binding upon our court.⁷ This is plainly not the case. See *Dodson v. Washington Automotive Co.*, 461 A.2d 1020 (D.C. 1983). We therefore must be guided by the restraints on third-party actions established in *Rodriguez*.

In this light, appellants' central contention is that a "unique" conflict of interest exists, sufficient to make out an exception to the requirements of § 933. Specifically, appellants urge that there is a disincentive for their employers to pursue their right to sue, where both Bechtel and their employers are bound by WMATA to subscribe to the same insurance program offered by the Lumbermen's Mutual Casualty Company. Therein, appellants argue that the running of the six-month period does not bar a third-party suit in the circumstance where a conflict of interest creates such a disincentive for the employer to sue. We disagree.

In *Rodriguez*, *supra*, the Supreme Court interpreted § 933(b) in light of its legislative history and successive amendments, and concluded that the six-month period following an award is "both mandatory and unequivocal." *Rodriguez v. Compass Shipping Co.*, *supra*, 451 U.S. at 602. We therefore hold that the trial court did not err

⁷ Appellants argue that *Rodriguez's* holding, which rejected conflicts of interest as a basis for preventing assignment of the right to sue from employee to employer, does not apply where the claimant is not a longshoreman. This is a strained and erroneous reading of *Rodriguez*, which we specifically rejected in *Dodson v. Washington Automotive Co.*, *supra*, 461 A.2d at 1024.

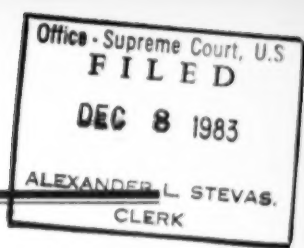
in relying upon *Rodriguez* when it granted appellees' motion for summary judgment. Once the compensation awards had been entered for appellants and the six-month grace period had passed, appellants' right to bring a third-party action was transferred automatically to their employers completely divesting appellants of their right to sue. This is so regardless of the asserted existence of a conflict of interest. See *Rodriguez, supra*.

C.

Finally, appellants ask that we limit the application of *Rodriguez* to prospective cases only. Noting that appellants both waited in excess of one year after receiving their formal compensation award to bring these actions, we decline to so hold. See generally *Mendes v. Johnson*, 389 A.2d 781 (D.C. 1978) (en banc).

Affirmed.

No. 83-747



IN THE
Supreme Court of the United States

OCTOBER TERM, 1983

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY,
Petitioner,
v.
PAUL D. JOHNSON, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States
Court of Appeals for the District of Columbia Circuit

REPLY BRIEF FOR THE PETITIONER

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TABLE OF AUTHORITIES

Cases:	Page
<i>Brown v. GSA</i> , 425 U.S. 820 (1970)	5
<i>Cannon v. University of Chicago</i> , 441 U.S. 677 (1979)	5
<i>DiNicola v. George Hyman Construction Co.</i> , 407 A.2d 670 (D.C. App. 1979)	5
<i>Edwards v. Bechtel Associates Professional Corp.</i> , 466 A.2d 436 (D.C. App.), cert. denied, No. 83-560 (Nov. 28, 1983)	4
<i>Fiore v. Royal Painting Co.</i> , 398 So.2d 863 (Fla. App. 1981)	5
<i>Miller v. Northside Danzi Construction Co.</i> , 629 P.2d 1389 (Alaska 1981)	5
<i>Potomac Electric Power Co. v. Director, OWCP</i> , 449 U.S. 268 (1980)	5
<i>Probst v. Southern Stevedoring Co.</i> , 379 F.2d 763 (5th Cir. 1967)	5
<i>Sweezy v. Arc Electrical Construction Co.</i> , 295 N.Y. 306, 67 N.E.2d 369 (1946)	5
<i>Thomas v. George Hyman Construction Co.</i> , 173 F.Supp. 381 (D.D.C. 1959)	5, 6
<i>Wilson v. Johns-Manville Sales Corp.</i> , 684 F.2d 111 (D.C. Cir. 1982)	6

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WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY,
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REPLY BRIEF FOR THE PETITIONER

1. In its Petition, WMATA demonstrated that the decision by the District of Columbia Circuit was in error for a variety of reasons: it misread the plain language of LHWCA Section 904(a), disregarded the *quid pro quo* nature of workers' compensation legislation, including the LHWCA, and leads to several absurd results Congress plainly could not have intended. The Commonwealth of Virginia and the State of Maryland, the two state signatories to the interstate compact under which WMATA was created, and the Association of Minority Contractors have filed *amicus* briefs agreeing with WMATA that the decision below is plainly in error and will inevitably produce the harmful consequences WMATA has forecast. Respondents' answer to these arguments is

to rely upon lower federal court decisions having nothing in common with this case and to ignore the harmful effects of the decision below.

It is important at the outset to identify the matters to which Respondents have presented little or no reply.

(a) Nowhere in their Opposition have Respondents contended that the plain language of Sections 904 and 905(a) supports their construction, or is at all ambiguous. In fact, Respondents do not even refer to the plain language of these provisions in their Opposition.

(b) Respondents have also offered no legislative history of the original LHWCA or any of its amendments to buttress their construction of Sections 904 and 905(a).

(c) Respondents similarly do not deny that the decision below robs WMATA of the *quid pro quo* that, as this Court has often reiterated, has always been regarded as central to the soundness, and even constitutionality, of every workers' compensation program ever adopted in this Nation.

(d) Finally, Respondents have not seriously disputed that the decision below will inevitably lead to the numerous anomalous and onerous results which are set forth in the Petition and the *amicus* briefs, and which Congress plainly could not have intended.

2. Respondents' principal argument (Opp. 7-11) simply reiterates the error committed by the Court of Appeals in failing to respect the plain language of LHWCA Section 904(a). Respondents continue to press the interpretation, unsupported by any of the decisions Respondents have cited, that Section 904(a) requires a subcontractor to secure workers' compensation. As we have already pointed out (Pet. 10-14), Section 904(a) plainly requires a contractor to obtain workers' compensation for all subcontractors' employees. *Amici* Virginia and Maryland, and the National Association of Minority Contrac-

tors concur in our construction of Section 904(a). *See* Va.-Md. Br. 4-5; Minority Contractors Br. 3. Because Respondents have cited nothing in the legislative history of the LHWCA or its numerous amendments to support their interpretation, the plain language of Section 904(a) is controlling and requires reversal of the judgment below.¹

3. Respondents have sought to evade the plain language of Section 904(a) by offering three different arguments, two of which even the Court of Appeals failed to accept. None of these arguments can withstand scrutiny.

(a) Respondents' initial argument is that the WMATA Interstate Compact (*see* Pet. 5) does not require WMATA to purchase workers' compensation insurance for all Metro construction employees. That is true but irrelevant. The statute at issue is the LHWCA, not the WMATA Interstate Compact, and LHWCA Section 904(a) clearly requires a general contractor—which every court below found WMATA to be (*see, e.g., id.* at 6-7; *see also* Va.-Md. Br. 4), and which Respondents have not challenged—to purchase such insurance. Furthermore, the

¹ Respondents have also misconstrued Question 2 of the Petition (*see* Opp. 9). The Court of Appeals accepted the concept that WMATA could be treated as a "statutory employer" under some circumstances, and thereby would be entitled to immunity from suit under Section 905(a) (*see* Pet. App. 22a). But the court ruled that WMATA was not entitled to immunity here because WMATA had adopted a wrap-up insurance program (*id.* at 21a-22a). Under the ruling below, WMATA forfeited its immunity as a statutory employer because it did not either make a futile demand that its subcontractors obtain the insurance that the insurance industry had made clear it was unwilling to provide, or await the historically-proven, near-certain default of any of its subcontractors in their effort to provide compensation coverage, with the attendant lapse in coverage for Metro construction laborers, before obtaining insurance. Neither the Court of Appeals nor Respondents have offered any reason why Congress would have intended to provide WMATA with immunity if it permits these lapses to occur but would deny WMATA immunity if it forestalls their occurrence.

WMATA Interstate Compact clearly *authorizes* WMATA to purchase workers' compensation insurance for Metro construction laborers (*see* Pet. 5). Accordingly, Respondents' contention is unavailing.

(b) Respondents' second argument—that the LHWCA does not immunize non-employer contractors (Opp. 8)—simply restates the central issue presented by the Petition. Respondents have not offered any reason why Congress would have wished to deny a contractor the immunity from suit Congress provided for in Section 905(a), while simultaneously burdening that contractor with the obligation of purchasing workers' compensation insurance under Section 904(a). And, as discussed below, none of the cases cited by Respondents supports such an anomalous proposition.

(c) Respondents' last argument in this regard (Opp. 8-9) is that WMATA's subcontractors, rather than WMATA itself, have secured compensation insurance. However, Respondents do not contest the factual finding made concurrently by each court below that WMATA *alone* purchased the compensation insurance under which each Respondent received a compensation award (*see, e.g.,* Pet. App. 49a-50a). The ruling of the District of Columbia Court of Appeals in *Edwards v. Betchel Assoc. Prof. Corp.*, 466 A.2d 436 (D.C. App.), *cert. denied*, No. 83-560 (Nov. 28, 1983), that WMATA's subcontractors "secured" workers' compensation insurance, simply by being listed as named insureds on WMATA's workers' compensation insurance policy, is not inconsistent with the conclusion that WMATA, who paid for that insurance, also secured compensation for Metro construction laborers.

4. Like the court below, Respondents have relied upon several earlier lower federal court decisions that are materially different from the case at hand. As we have al-

ready pointed out (Pet. 8; *see also* Va.-Md. Br. 5), none of these decisions ruled that a contractor, as the sole compensation provider, was not entitled to immunity under Section 905(a).² Each of these decisions ruled that a general contractor was not entitled to immunity either because the general contractor had never purchased workers' compensation insurance, or because the subcontractor had already done so (*see note 2, supra*; Va.-Md. Br. 5).

² The Fifth Circuit expressly left open the question of whether a general contractor was entitled to immunity if it was required to pay compensation to an employee. *Probst v. Southern Stevedoring Co.*, 379 F.2d 763, 767 (1967).

Both the subcontractor and the general contractor had purchased workers' compensation insurance in *DiNicola v. George Hyman Constr. Co.*, 407 A.2d 670, 671-672 (D.C. App. 1979), and in *Thomas v. George Hyman Constr. Co.*, 173 F.Supp. 381, 381 (D.D.C. 1959).

In *Fiore v. Royal Painting Co.*, 398 So.2d 863, 864 (Fla. App. 1981), the compensation insurance purchased by the subcontractor had lapsed, and, after an employee had sustained an injury, the contractor attempted to forestall suit by voluntarily making compensation payments.

Miller v. Northside Dansi Constr. Co., 629 P.2d 1389 (Alaska 1981), did not involve the LHWCA. The decision to deny a contractor immunity turned upon unique provisions of Alaska law. *Id.* at 1390-91.

Finally, Respondents' reliance (Opp. 11) upon the 1946 decision of the New York Court of Appeals in *Sweezey v. Arc Electrical Constr. Co.*, 295 N.Y. 306, 67 N.E.2d 369, to support their construction of LHWCA Sections 904 and 905(a) is in error. When Congress adopted the LHWCA in 1927, it modeled the Act after the then-existing New York workers' compensation law. *Potomac Electric Power Co. v. Director, OWCP*, 449 U.S. 268, 275 (1980). In 1927, New York law clearly suggested that a contractor like WMATA was entitled to immunity (*see* Pet. 14-15). Therefore, because "the relevant inquiry is not whether Congress correctly perceived the then state of the law, but rather what its perception of the state of the law was" (*Brown v. GSA*, 425 U.S. 820, 828 (1976); *see also Cannon v. University of Chicago*, 441 U.S. 677, 711 (1979)), a 1946 New York decision plainly lacks probative value as to Congress' understanding of New York law in 1927.

Indeed, in the seminal case on this matter, *Thomas v. George Hyman Constr. Co.*, *supra*, the court ruled that a contractor was not entitled to immunity *only* because a subcontractor had already purchased compensation insurance. 173 F. Supp. at 383. Because that is plainly not the case here, none of these decisions supports the ruling below.

5. As Virginia and Maryland have now made clear, the decision below subjects WMATA, an interstate agency, to different law in different forums (*see* Va.-Md. Br. 2-3; *see also* Pet. 17 & n.18). Under the law of Virginia and Maryland, WMATA would be wholly immune from tort suits like the ones brought here. Respondents' argument (Opp. 6-7) that Section 80 of the WMATA Interstate Compact waived WMATA's immunity from suit altogether therefore not only is plainly inconsistent with the express terms of that provision (*see* Pet. App. 43a-44a), but is also inconsistent with the understanding of the applicable law by the two state signatories to the Compact.³

³ Respondents' unsupported contention (Opp. 12) that the statute of limitations will bar most potential tort suits is plainly in error. As we have already pointed out (Pet. 18 n.20), the District of Columbia Circuit had adopted the "discovery rule" with respect to the running of the statute of limitations for latent disease cases of the type at issue here, such as asbestosis or silicosis. *Wilson v. Johns-Manville Sales Corp.*, 684 F.2d 111 (1982). Under that rule, a plaintiff's cause of action does not accrue, and the statute of limitations therefore does not begin to run, until the plaintiff receives a diagnosis of the specific injury for which suit is brought. *See* 684 F.2d at 116-121 (cause of action for mesothelioma not accrued upon earlier diagnosis of mild asbestosis). Hence, WMATA is potentially liable for a variety of tort claims arising out of the silicosis claims that Respondents and other laborers like them have brought here, and, because of the decision below, WMATA has been exposed to liability for claims of this type for an unforeseeable future.

6. Respondents also argue (Opp. 11) that WMATA's wrap-up program can be maintained in effect simply by requiring the subcontractors to pay the insurance premiums demanded by WMATA's carrier. That contention displays a remarkable ignorance of a wrap-up insurance program. No insurance carrier would endorse a single workers' compensation insurance policy that will be paid by literally hundreds of independent premium payments. Indeed, WMATA adopted its wrap-up insurance program because the insurance industry had made clear its unwillingness to underwrite individual insurance policies for each of WMATA's subcontractors (*see* Pet. 21-22)—the very system Respondents have suggested. Moreover, even if some carrier were willing to underwrite such a program, all the benefits of a wrap-up (*id.* at 23 n.26) would be lost through the multiplicity of overlapping policies. Furthermore, the only equitable method for apportioning premiums among the subcontractors would be to rely upon the risk involved for each one, and that approach would resurrect the system WMATA's wrap-up program was designed to replace. And, in so doing, many subcontractors, especially minority subcontractors (*see* Minority Contractors Br. 1-2, 4-6), would be priced out of any opportunity to participate in WMATA's construction projects.

Even more to the point, one can search the opinion below in vain for the gloss put on it by Respondents. They may feel that the wrap-up program can be maintained by having subcontractors pay insurance premiums, but the Court of Appeals has not said so, and the thrust of its opinion is to the contrary. Respondents' attempt to ameliorate the adverse impact of the ruling below by this new interpretation simply constitutes an admission that the ruling as it stands is both harsh and unworkable.

For the foregoing reasons and the reasons given in the Petition, the Petition should be granted. The deci-

sion below is also so plainly in error that the Court may wish to consider summary disposition.

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FILED

DEC 2 1983

ALEXANDER L. STEVANS.
CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1983

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY,
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v.

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Respondents.

On Petition for a Writ of Certiorari to the United States
Court of Appeals for the District of Columbia Circuit

**BRIEF AMICUS CURIAE OF THE NATIONAL
ASSOCIATION OF MINORITY CONTRACTORS
IN SUPPORT OF THE PETITION
FOR A WRIT OF CERTIORARI**

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF AMICUS CURIAE	1
ARGUMENT	3
CONCLUSION	6

TABLE OF AUTHORITIES

Cases

<i>Hilyer v. Morrison-Knudsen Construction Co.</i> , 670 F.2d 208 (D.C. Cir. 1981), <i>rev'd</i> , 103 S. Ct. 2054 (1983)	3
<i>Potomac Electric Power Co. v. Director, OWCP</i> , 606 F.2d 1324 (D.C. Cir. 1979), <i>rev'd</i> , 449 U.S. 268 (1980)	3
<i>Potomac Electric Power Co. v. Wynn</i> , 343 F.2d 295 (D.C. Cir. 1965)	3
<i>Riley v. U.S. Industries/Federal Sheet Metal, Inc.</i> , 627 F.2d 455 (D.C. Cir. 1980), <i>rev'd</i> , 455 U.S. 608 (1982)	3
<i>Rodriguez v. Compass Shipping Co.</i> , 451 U.S. 596 (1981)	3, 7
<i>United Steel Workers of America v. Weber</i> , 443 U.S. 193 (1979)	4

Other Authorities

Urban Mass Transportation Administration, Department of Transportation, Circular C1165.1 (Dec. 30, 1977)	4
General Services Administration Wrap Up Study (August 22, 1975)	5
Insurance for Urban Transportation Construction, Report No. UMTA-MA-06-0025-77-13 (June, 1977)	5
49 C.F.R. § 23.45, Appendix A (1983)	4
Washington Post, Nov. 24, 1983, B2	2

IN THE
Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-747

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY,
Petitioner,

v.

PAUL D. JOHNSON, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States
Court of Appeals for the District of Columbia Circuit

**BRIEF AMICUS CURIAE OF THE NATIONAL
ASSOCIATION OF MINORITY CONTRACTORS
IN SUPPORT OF THE PETITION
FOR A WRIT OF CERTIORARI**

INTEREST OF AMICUS CURIAE

The National Association of Minority Contractors is a national organization representing minority-owned enterprises principally engaged in the construction industry. Most minority contractors are small, new companies that have been able to compete with the more established and larger companies only through federal assistance and innovative methods of removing financial impediments. One of the most serious financial barriers minority contractors have faced has been the cost of insurance. Minority contractors have been unable to obtain individual insurance coverage at rates competitive

with the coverage available to the more established, larger contractors. The federal government has recommended the use of wrap-up insurance programs as an effective method of overcoming this financial impediment.¹ The decision below, however, denies the Petitioner the opportunity to employ its wrap-up insurance program as a means of providing comprehensive compensation coverage for minority contractors under the Longshoremen's and Harbor Workers' Compensation Act ("LHWCA"), 33 U.S.C. § 901, *et seq.* Because most minority contractors cannot obtain individual insurance coverage at competitive rates, the effect of the decision below will be to preclude them from participating in construction projects subject to the LHWCA by resurrecting the financial barriers the Petitioner's program had put an end to.

If the decision below is not reversed, the judicial branch of government will exacerbate the serious problems already inflicted upon minority contractors by the executive branch's continued reduction of federal assistance for construction projects, particularly mass transit systems.² The National Association of Minority Contractors, therefore, respectfully urges the reversal of the decision below, because it destroys a federally-approved insurance program that has previously been essential to

¹ See pages 4-5, *infra*. Wrap-up insurance programs provide that the owner or overall general contractor purchase insurance coverage for all contractors, subcontractors and, as frequently is the case with minority contractors, sub-contractors. This removes the cost of insurance as a factor in submitting a bid, and thus eliminates any difference resulting from the insurance industry's evaluation of a particular contractor's specific risk of loss.

² The executive branch has also reduced the goals set for minority participation in federally financed transportation projects, thereby causing increased concern by the Petitioner and the District of Columbia that the level of minority participation in the WMATA project will decrease. See *Metro Is Urged to Set Minority Goals Higher*, Wash. Post, Nov. 24, 1983 at B2.

maximize the participation of minority concerns in the construction industry.³

ARGUMENT

THE DECISION BELOW WILL PRECLUDE MOST MINORITY CONTRACTORS FROM PARTICIPATING IN PROJECTS SUBJECT TO THE LHWCA, AND IT WILL INEVITABLY SUBJECT THE EMPLOYEES OF THE REMAINING MINORITY CONTRACTORS TO PERIODS WITHOUT COMPENSATION COVERAGE.

Despite the oft repeated admonitions of this Court,⁴ the United States Court of Appeals for the District of Columbia Circuit has continued to redraft the LHWCA under the purported guise of "liberal construction" for the sole purpose of supposedly benefitting employees. Section 904(a) of the Act literally directs a general contractor to secure compensation benefits unless a subcontractor has secured such benefits. The Petitioner secured such benefits by the implementation of a wrap-up insurance program. The Court of Appeals, however, has ignored the plain language of Section 904(a) of the Act in order to allow the respondents to obtain double recoveries against the sole provider of compensation coverage. By so doing, the Court of Appeals has denied the Petitioner any *quid pro quo* for its bearing the cost and burden of no-fault compensation liability.

³ Respondents have consented to the filing of this amicus curiae brief, and this consent has been filed with the Clerk of the Court.

⁴ *Hilyer v. Morrison-Knudsen Construction Company*, 670 F.2d 208 (D.C. Cir. 1981), *rev'd*, 108 S. Ct. 2045 (1988); *Riley v. U.S. Industries/Federal Sheet Metal, Inc.*, 627 F.2d 455 (D.C. Cir. 1980), *rev'd*, 455 U.S. 608 (1982); *Potomac Electric Power Co. v. Director, OWCP*, 606 F.2d 1324 (D.C. Cir. 1979), *rev'd*, 449 U.S. 268 (1980); *compare Rodriguez v. Compass Shipping Co.*, 451 U.S. 596 (1981), *with Potomac Electric Power Co. v. Wynn*, 343 F.2d 295 (D.C. Cir. 1965).

The effect of the decision below transcends the increased liability of the Petitioner and its subcontractors (who may also be subject to tort liability),⁵ for it destroys the concept of wrap-up insurance, and will preclude many minority contractors from effectively competing for construction contracts. That decision will therefore exacerbate the already-serious racial imbalance in the construction industry. See, e.g., *United Steel Workers of America v. Weber*, 443 U.S. 193, 198 n.1 (1979) (collecting such findings). Further, the employees of minority contractors that can still obtain contracts will inevitably be exposed to periods without compensation coverage, because their employers will be compelled to purchase insurance from smaller, less secure carriers and/or the employers will invariably fail to stay current with the periodic payment of premiums.

This elimination of minority contractors from projects subject to the LHWCA is directly contrary to the efforts of the federal government to increase minority participation in the construction industry. For example, the Urban Mass Transportation Administration, which administers the federal funds provided to Petitioner, has expressly recommended wrap-up programs as a means of reducing the financial barriers that typically bar participation of minority concerns. In fact, the Urban Mass Transportation Administration directs applicants for federal funds to consider "providing wrap-up insurance for contractors and subcontractors" as a "means to overcome barriers to [minority program participation]." Urban Mass Transportation Administration, Department of Transportation, Circular C1165.1 (December 30, 1977). *Accord*, 49 C.F.R. § 23.45, Appendix A (1982).

Furthermore, a detailed study of wrap-up programs performed for the United States General Services Administration recommended the use of wrap-up programs

⁵ See footnote 16 of the decision. Pet. App. 56a n.16.

for all projects exceeding \$20 million in total costs, and expressly recognized that such programs maximize the participation of minority concerns. General Services Administration's Wrap Up Study, p. 14 (August 22, 1975). A similar study performed for the United States Department of Transportation also recommended the implementation of wrap-up insurance programs for all major construction projects, again noting that such coverage is the only practical way that minority concerns can effectively compete for subcontracts on such projects. Insurance for Urban Transportation Construction, Report No. UMTA-MA-06-0025-77-13, at p. 1-21 (June 1977).

The principal advantage to minority contractors of wrap-up insurance is that it eliminates the cost of insurance when bidding on a project. The fledgling status of many minority contractors makes them an unknown risk to insurance companies. Additionally, minority contractors are often undercapitalized, having little equity with which to guarantee the continuous and timely payment of premiums. It is a natural commercial response on the part of the insurance industry to charge an increased premium to such concerns. Unfortunately, these new concerns lack the profit margins of more established firms, and the additional cost of paying insurance premiums will frequently make the difference between a successful or unsuccessful competitive bid.

For those minority contractors that do make successful bids, it is inevitable that their employees will be subjected to periods without compensation coverage, which is a result obviously contrary to the principal purpose of the LHWCA. Many minority contractors do not have the commercial experience and knowledge of the insurance industry to calculate accurately the cost of insurance when submitting a bid that may be two or three years in anticipation of actual work. The premiums for compensation coverage, already high, can sharply increase over the

lifetime of a contract because of legislative action and actual loss experience. In areas subject to the LHWCA, rates are based on an employee's salary and the nature of his occupation, and comprise approximately two-thirds of the total insurance costs for construction projects. Rates up to \$50 for every \$100 in salary can be assessed for tunnel workers such as the respondents here. Accordingly, premiums for compensation insurance constitute a substantial portion of the bid price of a construction contract. If a minority contractor miscalculates the cost of premiums (or any other such substantial cost), the contractor will be faced with the dilemma of making a payroll or paying insurance premiums. The pressures to take the first option are obvious. Any missed premiums result in the termination of insurance, thereby exposing employees to periods without coverage for compensation.

Another factor causing lapses in insurance coverage is the utilization of financially uncertain insurance companies. It is an unfortunate fact of commercial life that minority contractors are not attractive as customers for established insurance carriers. Many minority contractors are forced to use smaller, fiscally weak insurance companies because they are the only carriers willing to provide them coverage. Such carriers can and do fail for various reasons, again exposing employees to periods without coverage.

CONCLUSION

The decision below ignores the plain language of the LHWCA and destroys a federally-approved method of increasing minority participation in the construction industry. The decision will cause contractors and owners subject to the LHWCA to terminate any present wrap-up programs and to avoid using them in the future. Most minority contractors will be priced out of the industry because they cannot obtain individual coverage at competitive rates. The remaining minority contractors will

unavoidably subject their employees to periods without coverage for compensation because they will be forced to purchase coverage from less reliable carriers than those available to other contractors and/or because they will be unable to pay their periodic premiums. The decision below, therefore, defeats the federal interest in ensuring the maximum participation of minorities in business enterprises and the federal interest of ensuring that employees are covered by compensation insurance at all times. As this Court has stated before, courts must construe the LHWCA as drafted and "adhere closely to what Congress has written. . . ." *Rodriguez v. Compass Shipping Co.*, 451 U.S. at 617. Accordingly, the National Association of Minority Contractors respectfully urges the Court to grant the petition for a writ of certiorari and to reverse the decision below

Respectfully submitted,

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**BRIEF AMICI CURIAE OF THE COMMONWEALTH
OF VIRGINIA AND THE STATE OF MARYLAND
IN SUPPORT OF THE PETITION
FOR A WRIT OF CERTIORARI**

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QUESTIONS PRESENTED

1. Whether the builder of an interstate rapid transit system that purchases compensation benefits for injured laborers pursuant to its obligation under a federally approved interstate Compact to act as general contractor is entitled to the statutory immunity from suit granted to contractors by the Longshoremen's and Harbor Workers' Compensation Act, or whether, as held by the District of Columbia Circuit, injured employees may recover both compensation and damages from the builder.

2. Whether the builder forfeits its statutory immunity from suit simply because it initially purchased workers' compensation protection for all construction employees rather than first demand that contractors—many of whom were uninsurable—themselves obtain workers' compensation insurance.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	(i)
INTEREST OF <i>AMICI</i>	1
ARGUMENT	3
CONCLUSION	8

TABLE OF AUTHORITIES

Cases:

<i>Anderson v. Thorington Construction Co., Inc.</i> , 201 Va. 266, 110 S.E.2d 396 (1959), appeal dis- missed for want of a properly presented sub- stantial federal question, 363 U.S. 719 (1960)....	2
<i>Consumer Product Safety Commission v. GTE Sylvania, Inc.</i> , 447 U.S. 102 (1980)	5
<i>Evans v. Newport News Shipbuilding and Dry Dock Co.</i> , 361 F.2d 364 (4th Cir. 1966)	2
<i>Morrison-Knudsen Construction Co. v. Director, OWCP</i> , 103 S. Ct. 2045 (1983)	7
<i>Potomac Electric Power Co. v. Director, OWCP</i> , 449 U.S. 268 (1980)	7
<i>Potomac Electric Power Co. v. Wynn</i> , 343 F.2d 295 (D.C. Cir. 1965)	6, 7
<i>Rodriguez v. Compass Shipping Co.</i> , 451 U.S. 596 (1981)	6, 7
<i>State ex rel. Reynolds v. City of Baltimore</i> , 86 A.2d 618 (Md. 1952)	2

Statutes:

33 U.S.C.	
§ 904	<i>passim</i>
§ 905	<i>passim</i>
Washington Metropolitan Area Transit Authority	
Compact, Pub. L. No. 89-774, 80 Stat. 1324.....	1
Md. Code Ann. § 10-204 (1977)	1

TABLE OF AUTHORITIES—Continued

	Page
Md. Code Ann. Art. 101, § 62 (Michie 1979)	2
Va. Code Ann. § 56-529 (1981)	1
Va. Code Ann. § 65.1-30 (1980)	2
§ 65.1-40 (1980)	2
1982 Va. Acts Ch. 684, April 21, 1982	3
 Miscellaneous:	
Lynton, <i>Metro's Deficit: Relentless Problem</i> , Wash. Post, April 17, 1983 at B1, B7	3
Report by the Comptroller General of the United States, General Accounting Office, <i>Longshore- men's and Harbor Workers' Compensation Act Needs Amending</i> (April 1982)	6

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OF VIRGINIA AND THE STATE OF MARYLAND
IN SUPPORT OF THE PETITION
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INTEREST OF AMICI

The Commonwealth of Virginia and the State of Maryland are signatories to the Washington Metropolitan Area Transit Authority Compact, Pub. L. No. 89-774, 80 Stat. 1324 (1966). See Ch. 2, 1966 Acts of Assembly, Va. Code Ann. § 56-529 (1981); Ch. 869, Acts of General Assembly 1965, Md. Code Ann. [Transportation] § 10-204 (1977). Virginia and Maryland assist in the financing of WMATA by contributing state funds for WMATA's op-

erating budget, from which WMATA pays damage awards. The decision below, which subjects WMATA to tort liability atop the workers' compensation awards WMATA has already paid, has a serious, adverse financial impact upon Virginia and Maryland. By denying WMATA any *quid pro quo* for its purchase of compensation, Virginia and Maryland will be saddled with damage awards as well as WMATA's compensation expenses. The decision below will also lead to an enormous increase in the litigation of injury claims arising out of the construction of the Metro by permitting each claimant to bring a damage suit after receiving compensation benefits. Therefore, in addition to the cost of defending and paying meritorious claims, Virginia and Maryland will be subjected to the cost of settling frivolous suits too costly to defend. Finally, the decision below will surely provide injured workers with greater total compensation and damage awards than these workers would receive as take-home pay if employed, thereby providing a disincentive for employees to return to work. Because of these adverse impacts upon the States' fisc, the decision below is of substantial interest to Virginia and Maryland.

Moreover, the decision below creates an anomaly in the law applicable to WMATA. The law of Virginia and Maryland clearly would provide a general contractor like WMATA with complete immunity from suit for all employment-related accidents. See, e.g., Va. Code Ann. §§ 65.1-30 & 65.1-40 (1980); *Evans v. Newport News Shipbuilding & Dry Dock Co.*, 361 F.2d 364 (4th Cir. 1966); *Anderson v. Thorington Construction Co., Inc.*, 201 Va. 266, 110 S.E.2d 396 (1959), *appeal dismissed for want of a properly presented substantial federal question*, 363 U.S. 719 (1960); Md. Code Ann. art. 101, § 62 (Michie 1979); *State ex rel. Reynolds v. City of Baltimore*, 86 A.2d 618 (Md. 1952). The decision below subjects WMATA to different rules for Virginia and Maryland, on the one hand, and for the District of Columbia, on the

other. Virginia and Maryland therefore have an additional interest in assuring that the interstate agency to which they are partners is not subject to different rules in different courts.

ARGUMENT

1. By ruling that WMATA could be subjected to damage awards despite WMATA's payment of workers' compensation claims, the decision below subjects the Commonwealth of Virginia and the State of Maryland to substantial additional liability for injury claims arising out of the construction of the Metro. While WMATA's operating revenues are intended to be the principal source of its funds, Virginia and Maryland, along with the District of Columbia and federal government, compensate for any deficit with state funds. *E.g.*, 1982 Va. Acts ch. 684, Apr. 21, 1982 (approving over \$40 million for FYs 1982-1984). These subsidies may exceed \$200 million for 1984, aside from the effects of the decision below. Lynton, *Metro's Deficit: Relentless Problem*, Wash. Post, Apr. 17, 1983, at B1, B7. By opening WMATA up to thousands of suits still within the statute of limitations for past injuries and to an untold number of future suits, the decision below will plainly have an adverse impact upon the State treasuries.

The decision of the Court of Appeals also threatens to undermine a long-standing, necessary, and cost-efficient means of providing workers' compensation coverage for Metro construction employees. Now universally employed in large construction projects, wrap-up programs provide a myriad of benefits that would otherwise be lost if each individual entity were forced to obtain its own compensation coverage, assuming that each could do so. See Pet. 23-25 & nn. 26 & 27 (describing benefits of wrap-up programs). The wrap-up insurance program adopted by WMATA provides continuous workers' compensation coverage for the employees of all of WMATA's contractors, subcontractors, and sub-subcontractors. At the same time,

the WMATA wrap-up program provides these benefits at a far lower cost than would be borne by the individual entities considered together. By denying WMATA immunity from suit, the Court of Appeals has eliminated those cost savings and has thrown into question the integrity of the entire wrap-up program. The Court of Appeals' belittlement of these benefits of WMATA's wrap-up program, *see* Pet. App. 55a, displays a rather cavalier attitude towards the States' fisc.

2. In addition to the importance of resolving the uncertainty created by the Court of Appeals' decision, further review is necessary here because the decision below misinterprets the LHWCA. Under the WMATA Interstate Compact, WMATA is the general contractor for the Metro, as every court below ruled. Section 904(a) plainly requires a "contractor," rather than a "subcontractor," to purchase workers' compensation insurance and to make the statutory compensation payments unless a subcontractor "has secured" compensation. *See* Pet. 3. The syntax Congress employed is significant because it assures that employees will be afforded continuous coverage. No language in the LHWCA requires a contractor to follow the two-step process outlined by the Court of Appeals, and that process, by permitting gaps in coverage to occur, is inconsistent with the plain language of Section 904(a).

Having fulfilled the requirements of Section 904(a), WMATA is entitled to the immunity from employee suits recognized by Section 905(a). Congress' failure to repeat the term "contractor" in Section 905(a) is of no consequence. Because the second sentence of Section 904(a) requires a contractor to step into the shoes of a subcontractor-employer with respect to the obligations imposed by the LHWCA, the most natural reading of Sections 904(a) and 905(a) would also afford that contractor the immunity Section 905(a) would otherwise provide the subcontractor-employer. The contrary conclu-

sion would assume that Congress was unaware of the shift from a subcontractor-employer to a contractor of the obligations imposed by Section 904(a). That conclusion would also assume that Congress intended to deny contractors, alone of all the parties required by the LHWCA to obtain workers' compensation coverage, the immunity from suit that had been a hallmark of every workers' compensation program ever adopted. Because nothing in the language of Sections 904(a) and 905(a) suggests any such result, the most straightforward interpretation of these sections compels the conclusion that WMATA is entitled to immunity.

Because there is nothing in the legislative history of the LHWCA or the District of Columbia Workmen's Compensation Act suggesting that Congress intended contractors to pursue the two-step process described by the Court of Appeals, the plain meaning of Section 904(a) is controlling. *See, e.g., Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). Furthermore, none of the lower court decisions relied upon by the Court of Appeals, *see* Pet. App. 52a-54a, supports the result below. Those cases fit into one of two categories: either both the subcontractor and contractor had purchased workers' compensation insurance, or the subcontractor alone had done so. In the first situation, the contractor would not be obligated to purchase workers' compensation insurance, because the subcontractor "ha[d] secured" compensation, and therefore the contractor would not be entitled to immunity. In the other situation, the contractor would not be entitled to immunity simply because it had not secured any workers' compensation insurance. This case is materially different because, as every court below found, WMATA alone purchased workers' compensation insurance. Hence, the lower federal court decisions upon which the Court of Appeals relied are inapposite.

Finally, denying WMATA immunity from suit leads to results that Congress could not have intended. First,

by permitting injured workers to sue WMATA as well as recover compensation benefits the decision below eliminates any *quid pro quo* WMATA would otherwise receive from purchasing compensation insurance. Second, the decision below resurrects the tort system that the LHWCA was designed to replace and will lead to an enormous increase in the litigation of employment-related injuries. And third, denying WMATA, the sole compensation provider, immunity will virtually guarantee that a disabled employee will receive compensation benefits that exceed the take-home pay he earned while employed. That result will not only encourage the filing of frivolous claims, in the hope of obtaining a favorable settlement, but will give workers a disincentive to return to work. To be sure, that disincentive already exists to some extent because of the tax-free nature of LHWCA benefits and the availability of collateral benefits from other sources which are not offset by LHWCA benefits. See Report by the Comptroller General of the United States, General Accounting Office, *Longshoremen's and Harbor Workers' Compensation Act Needs Amending* 13-17, 26 (Apr. 1982). But the decision below will exacerbate that problem.

3. The court below also gave especial weight to the principle that the LHWCA ought to be liberally construed to effectuate its remedial purposes, ruling that the "overriding purpose" of the Act was to provide injured workers with *both* compensation benefits and the right to a third-party suit in damages. See Pet. App. 51a; *id.* at 51a-56a. But the only authority the court cited in support of that proposition was the court's earlier decision in *Potomac Electric Power Co. v. Wynn*, 343 F.2d 295, 296 (D.C. Cir. 1965), which this Court had specifically overruled in *Rodriguez v. Compass Shipping Co.*, 451 U.S. 596, 614-617 (1981). Moreover, the District of Columbia Circuit's decision in *Wynn* antedated the 1972 Congressional amendments to the LHWCA, in which Congress made clear its intent "to minimize the need for

litigation as a means of providing compensation for injured workers." *Rodriguez*, 451 U.S. at 616. For both reasons, the Court of Appeals' reliance upon *Wynn* cannot be justified.

There is also no other reason for invoking the doctrine of liberal construction in this case. The primary purpose of the LHWCA is to afford injured workers absolute but limited compensation in exchange for their relinquishment of damage suits. See, e.g., *Morrison-Knudsen Construction Co. v. Director, OWCP*, 103 S. Ct. 2045, 2052 (1983); *Potomac Electric Power Co. v. Director, OWCP*, 449 U.S. 268, 281-282 (1980). Hence, the policy of liberal construction only justifies resolving doubtful cases in favor of an injured employee where the alternative is to leave him without any compensation and any tort suit at all. Where, as here, the employee has already recovered a compensation award, and the dispute is over the question of whether the employee may also obtain a damage award from the party who has already provided that compensation, the policy of liberal construction is inapplicable, since it is not the purpose of the LHWCA to burden a general contractor like WMATA with both compensation and tort liability. *Morrison-Knudsen*, 103 S. Ct. at 2052; *Potomac Electric Power Co. v. Director, OWCP*, 449 U.S. at 281-282 & n.24.

The only reason given by the Court of Appeals for liberally construing the LHWCA was to permit employees more easily to identify third-party defendants. See Pet. App. 56a. But that rationale is unavailing since the policy of liberal construction does not purport to allocate responsibility among potential third-party defendants or to make lawyering simpler. Hence, the Court of Appeals' concern with the easy availability of employees' third-party suits does not justify the result below.

CONCLUSION

For the foregoing reasons, and the reasons given in the Petition, this Court should reverse the judgment below. The decision below of the United States Court of Appeals for the District of Columbia Circuit is also so plainly in error as to warrant summary reversal.

Respectfully submitted,

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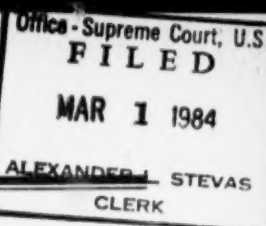
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QUESTIONS PRESENTED

1. Whether the builder of an interstate rapid transit system that purchases compensation benefits for injured laborers, pursuant to its obligation under a federally-approved interstate compact to act as general contractor, is entitled to the statutory immunity from suit granted to contractors by the Longshoremen's and Harbor Workers' Compensation Act, or whether, as held by the District of Columbia Circuit, injured employees may recover both compensation and damages from the builder.

2. Whether the builder forfeits its statutory immunity from suit simply because it initially purchased workers' compensation protection for all construction employees rather than first demanding that contractors—many of whom were uninsurable—themselves obtain workers' compensation insurance.

PARTIES TO THE PROCEEDINGS

Paul D. Johnson, Howard L. Eighmey, Calvin Walker, Rena Walker, John Warren Clanagan, Stanley Wilmes, James H. Buchanan, Shirley Buchanan, and Glenwood Williams* were appellants in the seven cases consolidated in the United States Court of Appeals for the District of Columbia Circuit.

The Washington Metropolitan Area Transit Authority, Bechtel Associates Professional Corp., D.C., and Bechtel Civil and Minerals, Inc., were appellees in all cases before the Court of Appeals.†

Appearing in the District Court at the initial stages of the litigation but not in the Court of Appeals were Gordon H. Ball, Inc., S. A. Healy Co., Granite Construction Co., James McHugh Construction Co., McLean, Grove & Skanska, Fruin-Colnon Construction Co., Horn Construction Co., J. F. Shea Construction Co., Morrison-Knudsen Contractors, Shea-S&M Joint Venture and Slatery Associates, Inc.

* Glenwood Williams was a respondent to the petition but is no longer a party to the case (*see* note 15, *infra*).

† Bechtel Associates Professional Corp., D.C., and Bechtel Civil and Minerals, Inc., are affiliates of Bechtel Group, Inc. Other affiliates of Bechtel Group, Inc., include Bechtel Power Corp., Bechtel Petroleum, Inc., Bechtel Investments, Inc., and Bechtel Professional Corp., Virginia.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	(i)
PARTIES TO THE PROCEEDINGS	ii
TABLE OF AUTHORITIES	vi
OPINIONS BELOW	1
JURISDICTION	2
RELEVANT STATUTES	2
STATEMENT	4
SUMMARY OF ARGUMENT	15
ARGUMENT	17
I. THE COURT OF APPEALS' DECISION IS DIRECTLY CONTRARY TO THE PLAIN LANGUAGE OF SECTION 904(a) OF THE LHWCA	17
A. The Plain Language of the Act Required WMATA To Secure Compensation Cover- age	17
B. The Court of Appeals' Clear Disregard of Section 904's Plain Language Cannot Be Justified by the Principle of Liberal Con- struction, by Previous Lower-Court Deci- sions, or by Any Alleged "Confusion" of Respondents	19
1. The Court of Appeals' Redrafting of Section 904 Is Not Excused by the Prin- ciple of Liberal Construction	20
2. The Lower-Court Decisions Relied Upon by the Court of Appeals Are Inapposite.	22
3. WMATA's Wrap-up Insurance Program Did Not "Confuse or Confound" the Re- spondents	23

TABLE OF CONTENTS—Continued

	Page
II. BY FULFILLING ITS STATUTORY DUTY UNDER LHWCA SECTION 904(a) TO SECURE AND PROVIDE COMPENSATION FOR METRO EMPLOYEES, WMATA BECAME ENTITLED TO IMMUNITY FROM THOSE EMPLOYEES' TORT SUITS UNDER LHWCA SECTION 905(a)	25
III. THE COURT OF APPEALS' DECISION WILL SUBVERT THE PURPOSES OF THE LHWCA	26
A. The Court of Appeals' Decision Will Undermine Congress' Intent to Ensure Employee Compensation Coverage	28
B. The Court of Appeals' Decision Will Undermine Congress' Intent to Ensure Swift Delivery of Benefits	35
C. The Third-Party Actions Invited by the Court of Appeals Will Create an Unmanageable Litigation Explosion in the Courts Below	36
IV. THE COURT OF APPEALS' DECISION WILL PROVIDE NUMEROUS OTHER ANOMALOUS RESULTS NOT INTENDED BY CONGRESS, INCLUDING THE PREVENTION OF LOW-COST EMPLOYER COVERAGE, THE CREATION OF CONFLICTING EMPLOYEE RECOVERIES WITHIN THE THREE WMATA COMPACT JURISDICTIONS, AND THE REDUCTION OF MINORITY CONTRACTOR INVOLVEMENT IN CONSTRUCTION PROJECTS	39
A. The Court of Appeals' Decision Will Mark the End of Wrap-up Programs in Projects Subject to the LHWCA	39

TABLE OF CONTENTS—Continued

	Page
B. The Court of Appeals' Decision Will Subject WMATA to Divergent Liability Within the Interstate Metro System	44
C. The Court of Appeals' Decision Will Prevent the Bulk of Minority Contractors from Participating in Major Construction Projects Subject to the LHWCA	44
CONCLUSION	47

TABLE OF AUTHORITIES

Cases	Page
<i>American Tobacco Co. v. Patterson</i> , 456 U.S. 63 (1982)	17, 34
<i>Anderson v. Thorington Construction Co.</i> , 201 Va. 266, 110 S.E.2d 396 (1959), <i>appeal dismissed for want of properly presented substantial federal question</i> , 368 U.S. 719 (1960)	44
<i>Bloomer v. Liberty Mutual Ins. Co.</i> , 445 U.S. 74 (1980)	22, 28, 38
<i>Bradford Elec. Light Co. v. Clapper</i> , 286 U.S. 145 (1932)	26, 27
<i>Cardillo v. Liberty Mutual Ins. Co.</i> , 330 U.S. 469 (1947)	26, 27, 35
<i>Chemehuevi Tribe of Indians v. FPC</i> , 420 U.S. 395 (1975)	26
<i>Commissioner v. Brown</i> , 380 U.S. 563 (1965)	34
<i>Consumer Product Safety Comm'n v. GTE Syl-</i> <i>vania, Inc.</i> , 447 U.S. 102 (1980)	17
<i>Dickerson v. New Banner Institute, Inc.</i> , 103 S. Ct. 986 (1983)	17
<i>DiNicola v. George Hyman Construction Co.</i> , 407 A.2d 670 (D.C. App. 1979)	23
<i>Director, OWCP v. Perini North River Associates</i> , 103 S. Ct. 634 (1983)	20, 26
<i>Director, OWCP v. Rasmussen</i> , 440 U.S. 29 (1979)	20
<i>Edmonds v. Compagnie Generale Transatlantique</i> , 443 U.S. 256 (1979)	38
<i>Evans v. Newport News Shipbuilding & Dry Dock</i> <i>Co.</i> , 361 F.2d 364 (4th Cir. 1966)	44
<i>Fiore v. Royal Painting Co.</i> , 398 So.2d 863 (Fla. App. 1981)	23
<i>Hilton v. Fifteen Hundred Massachusetts Ave.,</i> <i>Inc.</i> , 261 F.2d 377 (D.C. Cir. 1958)	9
<i>J.W. Bateson Co. v. United States ex rel. Board of</i> <i>Trustees</i> , 434 U.S. 586 (1978)	43
<i>Lockheed Aircraft Corp. v. United States</i> , 103 S. Ct. 1033 (1983)	27
<i>Morris v. WMATA</i> , 702 F.2d 1087 (D.C. Cir. 1983)	5

TABLE OF AUTHORITIES—Continued

	Page
<i>Morrison-Knudsen Construction Co. v. Director, OWCP</i> , 103 S. Ct. 2045 (1983)	<i>passim</i>
<i>Nations v. Sun Oil Co.</i> , 695 F.2d 933 (5th Cir. (1983))	29
<i>New York Central R.R. v. White</i> , 243 U.S. 188 (1917)	27, 28, 38
<i>Norton v. Warner Co.</i> , 321 U.S. 565 (1944)	27, 35
<i>Philbrook v. Glodgett</i> , 421 U.S. 707 (1975)	26
<i>Potomac Elec. Power Co. v. Director, OWCP</i> , 449 U.S. 268 (1980)	<i>passim</i>
<i>Potomac Elec. Power Co. v. Wynn</i> , 343 F.2d 295 (D.C. Cir. 1965)	14, 21
<i>Probst v. Southern Stevedoring Co.</i> , 379 F.2d 763 (5th Cir. 1967)	23
<i>Qasim v. WMATA</i> , 455 A.2d 904 (D.C.), <i>cert. denied</i> , 103 S. Ct. 2090 (1983)	5
<i>Reed v. The Yaka</i> , 373 U.S. 410 (1963)	26
<i>Rodriquez v. Compass Shipping Co.</i> , 451 U.S. 596 (1981)	<i>passim</i>
<i>State ex rel. Reynolds v. City of Baltimore</i> , 86 A.2d 618 (Md. 1952)	44
<i>Sweezy v. Arc. Elec. Construction Co.</i> , 295 N.Y. 306, 67 N.E.2d 369 (N.Y. 1946)	23
<i>Thomas v. George Hyman Construction Co.</i> , 173 F. Supp. 381 (D.D.C. 1959)	23
<i>Turner v. Transportacion Maritima Mexicana S.A.</i> , 44 F.R.D. 412 (E.D. Pa. 1968)	38
<i>Voris v. Eikel</i> , 346 U.S. 328 (1953)	20, 26
<i>Williams v. Bechtel Assocs. Prof. Corp., D.C.</i> , No. 82-1413 (D.C. Feb. 15, 1984) (<i>mem.</i>)	10
<i>Williams v. WMATA</i> , No. 83-822 (Jan. 16, 1984) ..	10
<i>Wilson v. Johns-Manville Sales Corp.</i> , 684 F.2d 111 (D.C. Cir. 1982)	37
<i>WMATA v. One Parcel of Land</i> , 706 F.2d 1313 (4th Cir.), <i>cert. denied</i> , 104 S. Ct. 238 (1983) ..	5
<i>Zenith Radio Corp. v. United States</i> , 427 U.S. 443 (1978)	43

TABLE OF AUTHORITIES—Continued

<i>Constitutional Provisions, Statutes, and Regulations</i>	<i>Page</i>
U.S. Const., art. I, § 8, cl. 17	5
U.S. Const., art. I, § 10, cl. 3	5
20 C.F.R. § 701.301(a) (13) (1983)	33
49 C.F.R. § 23.1-23.87 (1982)	45, 46
28 U.S.C. § 2154(1) (1976)	2
Longshoremen's and Harbor Workers' Compensation Act (1976) :	
33 U.S.C. § 904	<i>passim</i>
33 U.S.C. § 905	<i>passim</i>
33 U.S.C. § 907	30, 31
33 U.S.C. § 908	30, 31
33 U.S.C. § 909	30, 31
33 U.S.C. § 914	31, 32
33 U.S.C. § 915	32
33 U.S.C. § 918	32
33 U.S.C. § 921	32, 33
33 U.S.C. § 923	31
33 U.S.C. § 933	10
33 U.S.C. § 932	7, 31
33 U.S.C. § 936	32
33 U.S.C. § 938	3, 7, 31
33 U.S.C. § 944	32
33 U.S.C. § 948	31
Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d-2000d-5 (1976)	45
Urban Mass Transportation Act of 1964 (1976) :	
49 U.S.C. § 1604	45
49 U.S.C. § 1608(f)	45
Act of July 1, 1980, D.C. Law 3-77, 27 D.C.R. 2503 (codified at D.C. Code Ann. (§§ 36-301 to 36-344 (1981)))	4
District of Columbia Workmens' Compensation Act (1973) :	
D.C. Code § 36-501	3, 4
D.C. Code § 36-502	4
D.C. Code Ann. § 1-2431 (1981)	5, 10, 36
Ind. Code Ann. § 22-3-2-14 (Burns 1974)	19

TABLE OF AUTHORITIES—Continued

	Page
Ch. 869, Acts of General Assembly 1965, Md. Code Ann. [Transportation] § 10-204 (1977)	5
Md. Code Ann., art. 101, § 62 (Michie 1979)	44
National Capital Transportation Act Amendments of 1979, Pub. L. 96-184	45
N.C. Gen. Stat. § 97-10.1 (1979 repl. vol.)	19
Neb. Rev. Stat. § 48-116 (1978)	19
Va. Code Ann., §§ 65.1-30 & -40 (1980)	44
Ch. 2, 1966 Va. Acts of Assembly, Va. Code Ann. § 56-529 (1981)	5
Washington Metropolitan Area Transit Authority Interstate Compact, Pub. L. No. 89-774, 80 Stat. 1324 (1966)	3, 5
 <i>Congressional Material</i>	
<i>Hearings on Appropriations Before a Subcomm. of the House Comm. on Appropriations, 92d Cong., 2d Sess. (Mar. 20, 1972)</i>	<i>42</i>
<i>Hearings on H.R. 247 et al. Before a Select Subcomm. on Labor of the House Comm. on Education and Labor, 92d Cong., 2d Sess. (1972)</i>	<i>38</i>
H.R. 15627, 91st Cong., 2d Sess. (1970)	42
H.R. Rep. No. 1441, 92d Cong., 2d Sess. (1972)	28
S. Rep. No. 475, 96th Cong., 1st Sess. (1979)	45
S. Rep. No. 1115, 92d Cong., 2d Sess. (1972)	36
 <i>Other Authorities</i>	
Barrett, <i>Insurance for Urban Transportation Construction</i> , Report No. UMTA-MA-06-0025-77-13 (Dept. of Transp. 1977)	8, 41, 46
Becker & Denenberg, <i>Wrap-Up of the Wrap-Up</i> , CPCU Annals (Sept. 1967)	40, 41
<i>Best's Review</i> , Jan. 1984	30
J. Boyd, <i>A Treatise on the Law of Compensation for Injuries to Workmen Under Modern Industrial Statutes</i> (1913)	27
<i>Wrap-Up Insurance Program at Washington Metro Cuts Insurance Cost, Boosts Worker Safety</i> , Civil Engineering ASCE 88-89 (April 1978)	41

TABLE OF AUTHORITIES—Continued

	Page
General Services Administration, <i>Wrap Up Study</i> (Aug. 22, 1975)	40, 46
G. Heath, <i>Insurance Words and Their Meanings</i> (11th ed. 1975)	8
A. Larson, <i>The Law of Workmen's Compensation</i> (1983)	22, 25, 27, 34
Report of the Comptroller General of the United States, <i>Longshoremen's and Harbor Workers'</i> <i>Compensation Act Needs Amending</i> (Apr. 1982)	35, 36
Sullivan, <i>Casualty Insurance for Contractors, The</i> <i>Constructor</i> (April 1962)	41
2A Sutherland, <i>Statutory Construction</i> , § 45.12 (4th ed. 1973)	34
Urban Mass Transportation Administration, De- partment of Transportation, Circular C1165.1 (Dec. 30, 1977)	46
<i>Metro Is Urged to Set Minority Goals Higher</i> , <i>Washington Post</i> , Nov. 24, 1983	45
<i>Subway Insurance Becomes An Issue</i> , Washing- ton Evening Star, Feb. 4, 1970	41, 42
Letter to The Honorable John L. McMillan from Mr. Graham W. Watt, Ass't. to the Commis- sioner, dated April 3, 1970	42

IN THE
Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-747

WASHINGTON METROPOLITAN AREA
TRANSIT AUTHORITY,

Petitioner,

v.

PAUL D. JOHNSON, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals
for the District of Columbia Circuit

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The decisions of the United States District Court for the District of Columbia granting WMATA's motions for summary judgment (Pet. App. 1a-31a) are not officially reported. The decisions of the District Court denying plaintiffs' motions for postjudgment relief under Fed. R. Civ. P. 59(e) and 60(b)(3) (Pet. App. 32a-36a) are not officially reported. The decision of the United States Court of Appeals for the District of Columbia Circuit (Pet. App. 37a-64a) is reported at 717 F.2d 574. The orders of the Court of Appeals denying a Petition for Rehearing and a Suggestion for Rehearing En Banc (Pet. App.

65a, 66a) are not officially reported. The Court of Appeals' Order staying issuance of its mandate to November 7, 1983, pending the filing of a petition for a writ of certiorari (Pet. App. 67a) is not officially reported.

JURISDICTION

The Court of Appeals' decision in these cases was rendered on August 19, 1983 (Pet. App. 41a). A timely Petition for Rehearing and Suggestion for Rehearing En Banc was filed on September 2, 1983, and denied on October 3, 1983 (Pet. App. 65a, 66a). The petition for a writ of certiorari was filed on November 4, 1983, and was granted on January 16, 1984 (J.A. 332). The jurisdiction of this Court rests upon 28 U.S.C. § 1254(1) (1976).

RELEVANT STATUTES

Section 4 of the Longshoremen's and Harbor Workers' Compensation Act (33 U.S.C. § 904 (1976)) provides:

(a) Every employer shall be liable for and shall secure the payment to his employees of the compensation payable under sections 907, 908, and 909 of this title. In the case of an employer who is a subcontractor, the contractor shall be liable for and shall secure the payment of such compensation to employees of the subcontractor unless the subcontractor has secured such payment.

(b) Compensation shall be payable irrespective of fault as a cause for the injury.

Section 5 of the Longshoremen's and Harbor Workers' Compensation Act (33 U.S.C. § 905 (1976)) provides, in part:

(a) The liability of an employer prescribed in Section 904 of this title shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such em-

ployer at law * * * on account of such injury or death * * *.

Section 38(a) of the Longshoremen's and Harbor Workers' Compensation Act (33 U.S.C. § 938(a) (1976)) provides:

Any employer required to secure the payment of compensation under this chapter who fails to secure such compensation shall be guilty of a misdemeanor and, upon conviction thereof, shall be punished by a fine of not more than \$1,000, or by imprisonment for not more than one year, or by both such fine and imprisonment; and in any case where such employer is a corporation, the president, secretary, and treasurer thereof shall be also severally liable to such fine or imprisonment as herein provided for the failure of such corporation to secure the payment of compensation; and such president, secretary, and treasurer shall be severally personally liable, jointly with such corporation, for any compensation or other benefit which may accrue under the said chapter in respect to any injury which may occur to any employee of such corporation while it shall so fail to secure the payment of compensation as required by section 932 of this title.

District of Columbia Code § 36-501 (1973) provides:

The provisions of Chapter 18 of Title 33, U.S. Code, including all amendments that may hereafter be made thereto, shall apply in respect to the injury or death of an employee of an employer carrying on any employment in the District of Columbia, irrespective of the place where the injury or death occurs; except that in applying such provisions the term "employer" shall be held to mean every person carrying on any employment in the District of Columbia, and the term "employee" shall be held to mean every employee of any such person.

Article V, Section 12 of the Washington Metropolitan Area Transit Authority Interstate Compact (Pub. L. No. 89-774, 80 Stat. 1324 (1966)) provides, in part:

12. In addition to the powers and duties elsewhere described in this Title, and except as limited in this Title, the authority may:

(d) Construct * * * real and personal property * * * but all of said property * * * shall be necessary or useful in rendering transit service or in activities incidental thereto; * * *

(f) Enter into and perform contracts * * * with any person, firm or corporation * * * including, but not limited to, contracts or agreements to furnish transit facilities and service; * * *

(i) Contract for or employ any professional services; * * *

(m) Exercise * * * all powers reasonably necessary or essential to the declared objects and purposes of this Title.

STATEMENT

These seven cases¹ present a single issue for the Court's resolution: whether the Washington Metropolitan Area Transit Authority ("WMATA") may be held liable in tort for injuries to employees of its subcontractors which have already been redressed through the applicable workers' compensation statute. The issue turns on two provisions of the Longshoremen's and Harbor Workers' Compensation Act ("LHWCA"), 33 U.S.C. §§ 904 and 905 (a), that were adopted by the Congress in 1927 and incorporated the following year into the District of Columbia Workmen's Compensation Act ("DCWCA"), D.C. Code §§ 36-501 and -502 (1973).² WMATA's reliance on

¹ The Court of Appeals consolidated the seven cases and expedited their appeal (Pet. App. 41a n.1).

² Although a new District of Columbia statute went into effect on July 26, 1982 (Act of July 1, 1980, D.C. Law 3-77, 27 D.C.R. 2503 (codified at D.C. Code Ann. § 36-301 *et seq.*)), that Act adopts the relevant language of LHWCA Sections 904(a) and 905(a) as Sections 36-303(c) and 36-304(a) of the new District of Columbia Workers' Compensation Act.

those sections, and the lower courts' construction of them, are described below.

WMATA's Authority and its Provision for Workers' Compensation Coverage

WMATA is a governmental agency created by an interstate compact (the "WMATA Compact"); the Compact was enacted and consented to by Congress³ and adopted by the concurring legislation of the states of Maryland and Virginia.⁴ The WMATA Compact authorized and obligated WMATA to construct an interstate rapid transit system, colloquially known as "the Metro." To avoid having an unnecessary permanent construction staff of its own at the completion of the project, WMATA exercised its option⁵ to subcontract various portions of the Metro System (J.A. 213-214, 238, 250-252, 277). At the same time, however, WMATA retained overall control of the entire construction process through its Department of Design and Engineering, the office responsible for supervising, monitoring, and controlling all of the work performed by WMATA's numerous subcontractors (J.A. 162-184, 272, 275-277).

³ Washington Metropolitan Area Transit Authority Interstate Compact, Pub. L. No. 89-774, 80 Stat. 1324 (1966). Congress enacted the WMATA Compact acting as the local legislature for the District of Columbia (see U.S. Const. art. I, § 8, cl. 17), and it consented to the WMATA Compact acting as the national legislature, U.S. Const. art. I, § 10, cl. 3. See also *WMATA v. One Parcel of Land*, 706 F.2d 1312, 1316 (4th Cir.), cert. denied, 104 S. Ct. 238 (1983); *Morris v. WMATA*, 702 F.2d 1037, 1041 (D.C. Cir. 1983); *Qasim v. WMATA*, 455 A.2d 904, 906 (D.C.), cert. denied, 103 S. Ct. 2090 (1983).

⁴ See Ch. 2, 1966 Va. Acts of Assembly, Va. Code Ann. § 56-529 (1981); Ch. 869, Acts of General Assembly 1965, Md. Code Ann. [Transportation] § 10-204 (1977); see D.C. Code Ann. § 1-2431 (1981); see also J.A. 190.

⁵ Section 12 of the WMATA Compact authorized WMATA to delegate or subcontract portions of its construction obligation to others.

Phase I of the construction project began on December 9, 1969, and continued through July 30, 1971 (J.A. 261). During that period, WMATA engaged approximately a dozen subcontractors, who in turn engaged several dozen sub-subcontractors, each of whom was expected to purchase workers' compensation insurance for its immediate employees (*id.*). In practice, however, employees were at times left without coverage when individual policies lapsed—either because employers failed to make timely premium payments or because the insurance company involved went out of business (J.A. 265, 285, 299). While WMATA attempted to monitor the insurance status of its various subcontractors and sub-subcontractors to ensure that all Metro construction employees were protected at all times, the task proved impossible; there was simply no way to guarantee that WMATA would be notified of all potential lapses in coverage (J.A. 263). The inevitable result was that some employees were left without any workers' compensation coverage (J.A. 263-265).

Phase II of the construction project began on July 31, 1971 (J.A. 261). At that time, WMATA accelerated construction of the Metro and engaged literally hundreds of subcontractors who, in turn, engaged sub-subcontractors with thousands of employees—all subject to workers' compensation coverage under the LHWCA and DCWCA (J.A. 263). For essentially three reasons, WMATA determined in 1971 that it could no longer meet its statutory responsibilities by relying on the hope that each of the hundreds of subcontractors (and sub-subcontractors) would acquire and maintain the necessary compensation coverage.

First, as described above, WMATA's experience during Phase I had demonstrated that its subcontractors and their sub-subcontractors on occasion failed to secure and maintain workers' compensation coverage for their employees, resulting in periods in which those employees were not protected by such compensation. Moreover, in practice it was impossible for WMATA to be timely noti-

fied of all lapses in coverage so as to supply the necessary coverage itself (J.A. 263, 285). Not only were these inevitable gaps in coverage undesirable from the employees' perspective, but WMATA officials feared that those gaps would constitute a direct violation of the LHWCA, subjecting them to civil and criminal sanctions (J.A. 263-265, 299): Section 904 of that Act obliges a general contractor to "secure" * compensation benefits for any employee that the subcontractor has not already covered, and Section 938 makes any failure to so secure a misdemeanor punishable by a \$1,000 fine and a one-year prison term. These penalties apply not only to the company but to its officers as well.

Second, WMATA was (and is) obligated by law to provide minority contractors a maximum opportunity to participate in the construction of the federally-financed Metro Transit System.⁷ Because such contractors often could not (and still cannot) obtain insurance at competitive rates from established, dependable insurance firms, they would have been unable to make successful bids for WMATA's projects unless they turned to unreliable, often prohibitively expensive, "fly-by-night" insurance companies for coverage (J.A. 285). The necessary result was either that such minority contractors would not be awarded contracts or, if they were, that their employees' compensation coverage would not be reliable.

Finally, WMATA had learned that the insurance industry simply would not provide individual insurance policies for compensation coverage and general liability coverage up to the required \$50 million limit for each of its hundreds of subcontractors and their sub-subcontractors (J.A. 286). That problem was not unique to WMATA;

* "Securing" coverage is accomplished either by "insuring and keeping insured" the payment of compensation, or by qualifying as a self-insurer. 33 U.S.C. § 932(a).

⁷ See discussion in Part IV.C. of our argument at pp. 44-46, *infra*.

every major transit construction project has confronted the unwillingness of the insurance industry to provide separate insurance policies for hundreds of insureds subject to common risks in one narrow geographic area (J.A. 286). Moreover, WMATA also determined that even if *all* of its subcontractors and their sub-subcontractors could have obtained compensation coverage to protect *all* Metro construction employees, the cost to the public of acquiring that coverage would be greater than if WMATA itself simply purchased a single policy to cover *all* those employees.⁹

Based on its described obligations to ensure workers' compensation coverage, to employ minority-run companies, and to accomplish Metro's construction through the most efficient use of public funds, WMATA concluded that the only responsible approach was to purchase one, comprehensive "wrap-up" (or "wrap-around") policy⁹ to provide compensation coverage for *all* Metro construction employees (J.A. 263-266, 285-286, 299). Under the policy which WMATA purchased, it alone was responsible for paying compensation premiums, and WMATA's insurance carrier, Lumberman's Mutual Casualty Company ("LMC"), was responsible for making all compensation payments (J.A. 79-85, 269-271, 282).¹⁰ At the same time, however, the bid specifications submitted to each of WMATA's subcontractors made clear that each

⁹ J.A. 264. For example, a study conducted for the Department of Transportation estimated that WMATA's wrap-up program saved the public in excess of \$32 million during 1971-1976. Barrett, *Insurance for Urban Transportation Construction*, Report No. UMTA-MA-06-0025-77-13, at 3-18 (Dept. of Transp. 1977).

⁹ A "wrap-up policy" is "[a] tailored contract mainly for big construction projects where one policy is provided to cover all involved interests—the owner, the contractor, subcontractors, suppliers, etc." G. Heath, *Insurance Words And Their Meanings* 127 (11th ed. 1975).

¹⁰ The payment program was administered by National Loss Services Control Co., a subsidiary of Lumberman's Mutual Casualty Company, WMATA's insurance carrier (J.A. 81-83).

could obtain whatever insurance it thought necessary (J.A. 283). Thus, WMATA's wrap-up program assured coverage for any employees whose immediate subcontractor (or sub-subcontractor) elected not to purchase (or failed to maintain) its own workers' compensation insurance (J.A. 283-285). The described compensation coverage was in place at the time of each respondent's claimed injuries, and is still in effect today (J.A. 23-46).

Respondents' Suits Against WMATA

Respondents are all employees of subcontractors that WMATA engaged to build the Metro transit system during Phase II.¹¹ Every respondent filed a compensation claim for injuries allegedly sustained while working on the Metro project,¹² and all had received compensation payments or awards from WMATA's insurance carrier (LMC) (as much as \$120,000) when these suits were filed.¹³ In these suits, each respondent sought to supplement his compensation award by recovering tort dam-

¹¹ In three of the cases in the District Court, both the employee and his wife filed suit. Because an employee's spouse may not bring suit where the employee himself is barred (33 U.S.C. § 905(a); see, e.g., *Hilton v. Fifteen Hundred Massachusetts Ave., Inc.*, 261 F.2d 377, 378 (D.C. Cir. 1958)), we will refer to the employees alone as respondents.

¹² Most of the respondents' claims for compensation were based on respiratory injuries allegedly sustained from exposure to dust and other pollutants (Pet. App. 42a).

¹³ J.A. 47-67. The Court of Appeals' statement (Pet. App. 42a) that each respondent had recovered a compensation award by the time of its decision, while technically correct, is misleading in one minor respect. All respondents except Buchanan and Wilmes had received compensation lump sum awards at the time their lawsuits were filed (the awards totaled \$388,055, or an average of \$64,376 per respondent). While Buchanan had received a total of \$60,000 for two prior claims closely related to this case, and had also filed a claim for compensation here, the latter claim is not being pressed by his counsel at this time. Wilmes is presently receiving temporary partial benefits.

ages from WMATA based on the same injuries for which WMATA's insurance carrier had already paid compensation.¹⁴ In response to the suits, WMATA moved for summary judgment on the ground, *inter alia*, that it was immune from tort liability under LHWCA Sections 904 and 905 (a).¹⁵

The District Courts' Decisions

Each of five District Court judges (Corcoran, Flannery, June Green, Richey, and Smith, JJ.) granted WMATA's motions for summary judgment, ruling that WMATA was immune from respondents' suits (Pet. App. 1a-31a). The judges found that WMATA was the overall general contractor for the Metro transit sys-

¹⁴ Respondents also sued WMATA's agents, Bechtel Associates Professional Corporation, D.C., and Bechtel Civil and Minerals, Inc. ("Bechtel"). The District Court judges dismissed the suits against Bechtel on the ground that Bechtel was immune from suit under Section 80 of the WMATA Compact as WMATA's agent, and the Court of Appeals affirmed (*see* Pet. App. 43a-49a). *See* D.C. Code Ann. 1-2431[80] (1981). Respondents did not cross-petition for review of that judgment, and the issue is therefore not before the Court.

¹⁵ WMATA also asserted that it had been improperly added as a third-party defendant under Fed. R. Civ. P. 15(c) in four of the seven cases. The Court of Appeals declined to rule on that issue, and left it for further factual development by the District Court (Pet. App. 57a-59a). The issue therefore, is not before the Court.

Finally, WMATA contended that respondent Williams' suit was barred as untimely by 33 U.S.C. § 933(b) because it had not been filed within the six-month period fixed by that provision. The Court of Appeals affirmed the District Court's dismissal of Williams' suit (Pet. App. 60a-64a), and this Court denied review. *Williams v. WMATA*, No. 83-822 (Jan. 16, 1984). The District of Columbia Court of Appeals, however, has recently allowed Williams to add WMATA as a defendant in a parallel action brought against Bechtel in the Superior Court of the District of Columbia. *Williams v. Bechtel Assocs. Prof. Corp., D.C.*, No. 82-1413 (D.C. Feb. 15, 1984) (*mem.*).

tem,¹⁶ that the subcontractors on the system had not purchased compensation insurance for their employees, and that WMATA had appropriately purchased (pursuant to Section 904(a)) the requisite insurance that had funded the compensation awards to respondents.¹⁷

¹⁶ In five cases, the court specifically made this finding (Pet. App. 1a, 7a, 14a, 24a, 28a), and in the remaining two the finding is a necessary inference from the court's conclusion.

In the *Eighmey* case, for example, the court held that "WMATA is in the position of overall general contractor for subway construction in the Washington, D.C. area, with the responsibility of supervising numerous consultants, general contractors, and subcontractors" (Pet. App. 1a).

In each of the cases below, WMATA filed a sworn affidavit of its Secretary stating that "WMATA, as the general contractor, has contracted with private construction companies, as subcontractors, to build the WMATA subway system" (J.A. 25-28, 31-32, 35-36, 39-40, 43-44). After the District Court judges had granted several of WMATA's motions for summary judgment, counsel for the respondents challenged this sworn statement through motions for reconsideration under Rules 59 and 60(b) of the Federal Rules of Civil Procedure. Judge Flannery allowed counsel for the respondents to conduct complete discovery into this issue. WMATA itself thereafter relied on the resulting discovery in support of its opposition to these motions. Upon review of the discovery, Judge Flannery characterized respondents' contention that WMATA was not a general contractor as nothing more than "verbal gymnastics" (Pet. App. 28a). The remaining District Court judges agreed, two of them awarding WMATA costs and attorneys' fees for being forced to defend itself against the issue (Pet. App. 33a, 34a). Respondents renewed their claim that WMATA is not a general contractor in the Court of Appeals (Brief for Appellants, 1-22), but that court refused to disturb the District Courts' finding (*see* Pet. App. 42a, 49a-57a). Consequently, there is no reason for this Court to reconsider the factual conclusion on this issue by both the trial and appellate courts.

¹⁷ For instance, Judge Corcoran found that "[h]ere, by agreement with its subcontractors, the general contractor, WMATA, became the sole purchaser of workmen's compensation coverage; and it was from that coverage that the plaintiff received his benefits" (Pet. App. 10a). To the same effect are the decisions of the other judges (Pet. App. 1a-2a, 7a, 14a, 20a, 24a, 28a-29a).

Consequently, the district judges uniformly held that WMATA was entitled to *quid pro quo* immunity from the respondents' suits under Section 905(a). For example, in granting judgment for WMATA, Judge Corcoran articulated the common rationale underlying these holdings: "[i]t has long been recognized that the purchase of workmen's compensation coverage and the payment of benefits is the *quid pro quo* for the release under § 905 (a) from common law liability" (Pet. App. 9a) (citations omitted). Similarly, Judge Flannery ruled that:

Under the WMATA Compact WMATA clearly fulfills the function of overall general contractor of the rapid transit system and, as purchaser of worker's [sic] compensation insurance, is entitled to statutory immunity from suit. [Pet. App. 28a-29a; *see also id.* at 2a, 10a, 16a, 21a, 24a-25a.]

The Court of Appeals' Decision

The Court of Appeals reversed all of the District Court decisions. At the outset, however, the court accepted the basic factual findings made by each District Court judge. Thus, the Court of Appeals acknowledged that: (a) "WMATA exercises the ultimate control of and authority for the construction and operation of the subway system" (Pet. App. 42a); (b) the injured employees "were employed by construction companies under contract to WMATA to construct specific segments of the Metro project" (Pet. App. 49a); (c) "[t]hese subcontractors did *not* purchase workmen's compensation insurance for their employees * * *" (Pet. App. 49a-50a) (emphasis in original); (d) "* * * WMATA purchased such insurance to cover all laborers and other employees working on the Metro system" (Pet. App. 50a); and (e) "[a]fter sustaining an injury, each employee filed for and received workmen's compensation benefits" (*id.*).

Moreover, the Court of Appeals also acknowledged the important legal principles which control the implemen-

tation of the LHWCA. Thus, the court recognized that: (a) the purpose of the LHWCA is "to insure that all employees are covered by worker's compensation insurance and will thereby receive prompt compensation for work-related injuries" (Pet. App. 51a-52a); (b) this purpose is effectuated under the Act by requiring either the immediate employer or the general contractor—on pain of criminal sanctions—to secure and maintain insurance for all employees (*id.*); and (c) "in return for carrying the required insurance," the general contractor receives immunity from tort liability under Section 905(a) (*id.*).

Nevertheless, the court declared that WMATA was not entitled to immunity in exchange for the compensation it had secured and paid for because it was *not required* by Section 904(a) to provide that compensation coverage. Section 904(a) states that "the contractor shall be liable for and shall secure the payment of * * * compensation to the employees of the subcontractor unless the subcontractor has secured such payment." Even though the court acknowledged that, when WMATA purchased insurance, the subcontractors had not in fact "secured such payment,"¹⁸ it held that "[t]o benefit from securing the insurance [*i.e.*, to receive immunity], WMATA must *first* require its subcontractors to purchase the insurance" (Pet. App. 54a) (emphasis in original). Since WMATA had not attempted to impose such a requirement, said the court, WMATA had "pre-empted" its subcontractors' statutory duty (Pet. App. 54a). In the court's view, therefore, the steps taken by WMATA to ensure compensation coverage for all Metro construction employees constituted a *purely voluntary* ex-

¹⁸ Indeed, it is undisputed that none of the subcontractors (or sub-subcontractors) ever purchased any compensation insurance for this project (Pet. App. 51a, 54a, 56a).

penditure of public funds and a "circumventing [of] the statutory scheme" (Pet. App. 56a; *see also id.* at 54a, 55a).¹⁹

Although nothing in Section 904(a) imposes any duty on a general contractor to "first require its subcontractors to purchase the insurance," the court attempted to justify its construction of the statute on essentially three grounds. First, said the court, the LHWCA "must be construed liberally in favor of the injured employee" (Pet. App. 51a, quoting *Potomac Elec. Power Co. v. Wynn*, 343 F.2d 295, 296 (D.C. Cir. 1965)). Second, the court relied on a number of lower-court decisions in which (unlike this case) general-contractor immunity was denied either where the general contractor had purchased *no* insurance, or where a subcontractor had *already* purchased insurance.²⁰ Finally (and completely contrary to the record²¹), the court determined that WMATA's "deviation from the statutory scheme" had served to "confuse and confound" the respondents concerning who—WMATA or their immediate employers—should be the defendant in any third-party negligence suit.

As we will show, each rationale relied on by the Court of Appeals is without merit, the result it has reached is flatly contrary to the plain language of Section 904, and its decision, if upheld, will subvert the purposes of the LHWCA and produce results never intended by Congress.

¹⁹ The court also rejected out of hand WMATA's contentions that it had undertaken the wrap-up program as the *only* effective way to ensure employee coverage at all times, to permit minority-contractor participation, and to achieve cost savings in employee coverage on the public's behalf. The court found that none of these factors could "excuse deviation" from its view of "the statutory scheme" (Pet. App. 55a).

²⁰ *See* pp. 22-23 & n.31, *infra*, for a discussion of these cases.

²¹ *See* pp. 23-25, *infra*.

SUMMARY OF ARGUMENT

Section 904 of the LHWCA is simple and straightforward. It requires a general contractor on a construction project to secure workers' compensation coverage for the employees of its subcontractors, "unless the subcontractor has secured" such coverage already. Here, WMATA, acting as general contractor for the construction of the Washington-area Metro system, provided such coverage for all employees engaged in the construction; no subcontractors at any time purchased insurance for any Metro construction employee. Nevertheless, the Court of Appeals held that WMATA *voluntarily* purchased insurance and, as a consequence, is not entitled to immunity from "third-party actions" brought by employees who have already received compensation benefits from coverage purchased by WMATA.

The Court of Appeals' decision is flatly contrary to the plain language of Section 904; no construction of that section can be read to require, as the Court of Appeals said it does, that a general contractor must "*first* require its subcontractors to purchase the insurance (Pet. App. 54a)" before acquiring coverage itself. Nothing in this Court's decisions, any lower-court decisions, or the record in this case justifies such judicial legislation.

Assuming that WMATA fulfilled its duty to secure compensation coverage under Section 904, it is entitled to the same immunity an "employer" would receive under Section 905(a). That entitlement, which the Court of Appeals itself conceded, is the only construction of the LHWCA consistent with the *quid pro quo* underlying the statute. Indeed, a contrary construction would paralyze the operation of the LHWCA in any case where compensation was secured by a general contractor, since that contractor would then have no "employer" obligations to ensure actual delivery of the secured compensation benefits.

While the Court of Appeals' decision may benefit the particular employees who brought suit in this case, it will unquestionably defeat the purposes of the LHWCA and thereby work to the distinct disadvantage of the vast majority of other employees. Thus, if upheld, the decision will raise doubts concerning which general contractors, if any, are required to secure compensation coverage, and it will inevitably create gaps in the necessary coverage. Furthermore, it will encourage contractors and other employers who are made subject to tort suits by the decision below to controvert compensation claims, thereby undermining Congress' avowed intention to ensure swift, certain delivery of no-fault benefits to injured employees. In addition, it will provoke vastly increased tort litigation *against* employers and contractors, and indemnification litigation *between* employers and contractors, all of which the LHWCA was specifically designed to prevent.

Finally, the decision will also produce three other significant, detrimental results that Congress plainly did not intend: it will prevent the use of the most cost-effective, taxpayer-saving method for covering employees—wrap-up insurance; it will lead to conflicting employee recoveries depending on the particular WMATA jurisdiction (D.C., Maryland, or Virginia) in which the injury occurred; and it will necessarily reduce the number of minority contractors who can successfully participate in construction projects, either because such contractors may be unable to acquire the necessary compensation coverage, or because they cannot acquire it at a competitive price.

ARGUMENT

I. THE COURT OF APPEALS' DECISION IS DIRECTLY CONTRARY TO THE PLAIN LANGUAGE OF SECTION 904(a) OF THE LHWCA

A. The Plain Language of the Act Required WMATA To Secure Compensation Coverage

This Court has repeatedly held that where the language of the LHWCA is plain, it should be respected and followed by the courts. *See, e.g., Morrison-Knudsen Constr. Co. v. Director, OWCP*, 103 S. Ct. 2045, 2049 (1983); *Rodriguez v. Compass Shipping Co.*, 451 U.S. 596, 602-603, 616-617 (1981); *Potomac Elec. Power Co. v. Director, OWCP*, 449 U.S. 268, 273-274 (1980) ("*Pepco*").²² As the Court stated in *Rodriguez*, where the issue concerns the intent of Congress in the LHWCA, "the wisest course is to adhere closely to what Congress has written." 451 U.S. at 617.

That is not the course the lower court followed in this case. Instead, contrary to the straightforward application of Section 904(a) by five District Court judges, the Court of Appeals elected to read into that section a requirement that is simply not there. The section unconditionally states that a general contractor like WMATA "shall be liable for and shall secure the payment of * * * compensation * * * unless the subcontractor has secured such payment." There is no dispute that the subcontract-

²² These cases interpreting the LHWCA follow the well-established tenet of statutory construction that the plain language of a statute "must ordinarily be regarded as conclusive." *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980); *Dickerson v. New Banner Institute, Inc.*, 103 S. Ct. 986, 990 (1983); *American Tobacco Co. v. Patterson*, 456 U.S. 63, 68 (1982) ("As in all cases involving statutory construction, 'our starting point must be the language employed by Congress' * * * and we assume 'that the legislative purpose is expressed by the ordinary meaning of the words used'") (citations omitted).

tors in this case had not purchased compensation for this project when WMATA purchased the coverage; that WMATA procured insurance primarily to ensure that continuous, low-cost coverage for *all* employees would in fact be maintained; that WMATA believed with good reason that at least some subcontractors would fail to acquire and maintain coverage; and that its contracts expressly provided that all subcontractors were free to acquire their own insurance. There is furthermore no dispute that WMATA did secure compensation insurance and that respondents have in fact been paid compensation benefits. Finally, the Court of Appeals itself recognized that if WMATA were required by Section 904(a) to secure and pay the benefits which respondents have received, WMATA is entitled to immunity under Section 905(a): "by providing compensation insurance when the subcontractors fail to do so * * * WMATA obtains immunity as a statutory employer" (Pet. App. 54a-55a) (emphasis omitted).²³

The only dispute, then, is a very narrow one: whether the Court of Appeals' construction of Section 904(a) can be sustained in the face of the plain words of that statute. Those words categorically obliged WMATA to secure compensation in any case where its subcontractors had not already secured it. The Court of Appeals, however, has added *its own* condition to this statute; indeed, the lower court has completely rewritten the statute to provide in essence:

²³ WMATA does not concede that it is entitled to immunity under Section 905 *only if* it had a "duty" to secure compensation under Section 904. However, since (as we will show) WMATA unquestionably had such a "duty," we do not reach—and the Court need not reach—the question whether WMATA would be entitled to immunity even if it were a "voluntary" compensation-provider as found by the Court of Appeals. Moreover, as we discuss in Part III of our argument (*see* pp. 30-34), if WMATA indeed had no duty to secure compensation, then it also has no duty to pay compensation or to provide any of the other employee benefits stipulated in the LHWCA.

a contractor need not secure compensation for any subcontractor's employee unless that subcontractor has failed to secure such compensation *and* unless that subcontractor continues in that failure after being required by the contractor to secure the compensation.

Congress arguably could have written such a statute,²⁴ as, in fact, a few states specifically have done. In Nebraska and Indiana, for example, the legislatures chose to impose this very type of two-step process. Neb. Rev. Stat. § 48-116 (1978); Ind. Code Ann. § 22-3-2-14 (Burns 1974). *See also* N.C. Gen. Stat. § 97-10.1 (1979 repl. vol.). But there can surely be no serious argument that Congress wrote such a provision when it enacted Section 904. That section specifically and unmistakably requires a general contractor such as WMATA to secure compensation unless its subcontractors have already done so. Since here they had not already done so, WMATA was required under Section 904(a) to secure the compensation for respondents, and, as the Court of Appeals conceded, if WMATA was *required to* and did secure compensation, it is entitled to immunity under Section 905(a) (Pet. App. 52a).

B. The Court of Appeals' Clear Disregard of Section 904's Plain Language Cannot Be Justified by the Principle of Liberal Construction, by Previous Lower-Court Decisions, or by Any Alleged "Confusion" of Respondents

The Court of Appeals attempted to justify its departure from the plain language of Section 904 on three grounds. First, the court premised its construction on the proposition that the "Act must be construed liberally in favor of the injured employee" (Pet. App. 51a). Second, it relied on previous lower-court decisions that

²⁴ As discussed in Part III of our argument, however, it is highly improbable that Congress would even have considered such a statute since it would run directly counter to the purposes of the LHWCA.

had denied immunity to general contractors on different facts (Pet. App. 52a-54a). Third, it asserted that the effect of WMATA's wrap-up insurance program was to "confuse and confound" the respondents as to the proper third-party defendant, *i.e.*, whether that defendant should be their immediate employer or WMATA (Pet. App. 56a). As explained below, these three asserted grounds provide no justification for the Court of Appeals' redrafting of Section 904.

1. *The Court of Appeals' Redrafting of Section 904 Is Not Excused by the Principle of Liberal Construction*

Although this Court has often used the principle of liberal construction to construe otherwise ambiguous Congressional intent by resolving doubtful language in favor of a particular class, the principle by definition is not a license for courts to rewrite or ignore plain statutory language.²⁵ The Court of Appeals, therefore, has misused the principle in this case.

Furthermore, even if there were some ambiguity in Section 904—which there is not—in the case of the LHWCA the stated principle in any event requires that the "Act must be liberally construed *in conformance with its purpose, and in a way which avoids harsh and incongruous results.*"²⁶ That is not what the Court of Appeals has done. The fundamental purpose of the LHWCA—and every other workmen's compensation act—is to guarantee the swift provision of no-fault, compensation benefits to injured employees.²⁷ As discussed more fully in Part III of our argument, the Court of Appeals'

²⁵ *Pepco*, 449 U.S. at 283-284; accord *Rodriguez*, 415 U.S. at 617; *Director, OWCP v. Rasmussen*, 440 U.S. 29, 47 (1979).

²⁶ *Director, OWCP v. Perini North River Associates*, 103 S. Ct. 634, 647 (1983) (emphasis added) (quoting *Voris v. Eikel*, 346 U.S. 328, 333 (1953)).

²⁷ See authorities discussed on pp. 26-28, *infra*.

decision will in practice subvert those purposes by creating inevitable gaps in employee coverage, slowing down delivery of benefits through the creation of contractor incentives to resist compensation claims, and spawning enormous litigation over responsibility for employee injuries.

The Court of Appeals premised its mistaken view of "liberal construction" on its own earlier decision in *Potomac Elec. Power Co. v. Wynn*, 343 F.2d at 296: "Narrow statutory construction should not deprive the injured employee of either his compensation or his claim in damages against third parties" (Pet. App. 51a) (emphasis added). The court failed to note, however, that this Court had unequivocally overruled *Wynn* more than two years before, in *Rodriguez*, 451 U.S. at 614-617. Moreover, the Court of Appeals' statement stands the doctrine of liberal construction on its head and uses it to produce the exact opposite of its true purpose; this is because the court's "liberal" construction for the benefit of the respondents in this tort suit narrows the situations in which full coverage will be provided for other employees' compensation claims. While the court may have done a favor for these respondents, it has clearly diminished the compensation rights of a far greater number of workers who in the future will be deprived of the income and medical benefits they need to survive, because general contractors like WMATA will not have guaranteed coverage.²⁸

²⁸ See further discussion in Part III of our argument. This Court need look no further than respondents' brief below to find the most spectacular illustration of what happens when "liberal construction" is given full play in this type of tort case. Respondents' first and principle argument in the Court of Appeals was that WMATA was not a statutory employer at all under Section 904. Brief for Appellants, pp. 1-22. If this argument had succeeded, WMATA would have had no compensation liability and no statutory obligation to see that its subcontractors were insured. In a typical injury to an employee of an uninsured subcontractor that was not

The Court of Appeals has simply treated Section 904 as if it were part of an overall "statutory scheme" to provide tort recoveries to employees. Yet, Section 904 does not contain a word about tort liability.²⁹ It deals exclusively with compensation liability and insurance. Nevertheless, the court stated that WMATA's wrap-up insurance would "frustrate the operation of the Act"—as if the Act were designed primarily to provide tort recovery. Of course, that is not so. The "operation of the Act" is designed to provide assured compensation benefits—promptly, efficiently, and without dispute. The Court of Appeals' decision will retard, not advance, that operation.³⁰

2. The Lower-Court Decisions Relied Upon by the Court of Appeals Are Inapposite

The lower-court decisions upon which the Court of Appeals relied (Pet. App. 52a-54a) also fail to justify its departure from the plain language of Section 904. In each of those decisions either (a) the general contractor had not secured workers' compensation insurance *at all*, or (b) the subcontractor had already secured compensation through the purchase of its own insurance. In the first situation, because the general contractor obviously had not met any duty to secure compensation, the courts declined to afford it immunity. In the second situation, because the subcontractor's purchase of workers' compensation insurance was found to have relieved the general

due to WMATA's negligence, the employee would have no remedy for compensation at all and no remedy in tort against WMATA. It is noteworthy in this connection that a majority of accidents are not caused by the negligence of the contractor or subcontractor. See 1 A. Larson, *The Law of Workmen's Compensation* 27 (1983).

²⁹ To the contrary, Congress intended "to minimize the need for litigation as a means of providing compensation for injured workmen." *Rodriguez*, 451 U.S. at 616; *Bloomer v. Liberty Mutual Ins. Co.*, 445 U.S. 74, 86 (1980).

³⁰ See further discussion of this point in Part III of our argument.

contractor of any duty to secure compensation, the general contractor's additional purchase of compensation insurance was deemed an unnecessary act that did not provide the injured employee any added benefit. In both situations, no *quid pro quo* was provided by the general contractor, and hence no immunity was conferred.³¹

Plainly, neither of these two situations is presented here. WMATA alone purchased workers' compensation insurance, and the respondents have received substantial compensation benefits from that insurance (Pet. App. 49a-50a). Accordingly, there has been a *quid pro quo* for the immunity that the Court of Appeals denied to WMATA. Nothing in Section 904 or the cited cases justifies that denial.

3. *WMATA's Wrap-up Insurance Program Did Not "Confuse or Confound" the Respondents*

The final ground relied on by the Court of Appeals underscores its mistaken perception that the LHCWA exists principally to facilitate third-party actions. The

³¹ In *Probst v. Southern Stevedoring Co.*, 379 F.2d 763, 767 (5th Cir. 1967), and *DiNicola v. George Hyman Constr. Co.*, 407 A.2d 670, 671-672 (D.C. App. 1979), only the subcontractor purchased compensation coverage. In *Thomas v. George Hyman Constr. Co.*, 173 F. Supp. 381, 383 (D.D.C. 1959), both the subcontractor and the general contractor had purchased workers' compensation insurance. Moreover, in *Probst* the Fifth Circuit expressly left open the question whether a general contractor would be entitled to tort immunity if it were actually required to pay compensation to an injured employee.

In *Fiore v. Royal Painting Co.*, 398 So.2d 863, 864 (Fla. App. 1981), the compensation insurance purchased by the subcontractor had lapsed, and the general contractor paid the claim directly; the contractor had not secured compensation by the purchase of insurance. Cf. *Sweezy v. Arc. Elec. Constr. Co.*, 295 N.Y. 306, 67 N.E.2d 369 (N.Y. 1946) (denying immunity to a contractor because the only duty imposed upon the general contractor by the state statute (unlike Section 904 of the LHCWA) was to pay compensation benefits if the subcontractor did not secure such payment; no general-contractor duty to secure compensation was contained in the statute).

court surmised that WMATA's wrap-up insurance program had "confused and confounded" the respondents concerning whether they should sue their immediate employers or WMATA as third parties, causing a possible statute of limitation problem. Accordingly, said the court, the respondents should be permitted to sue WMATA (Pet. App. 56a-57a). It is not at all clear how such "confusion," even if it existed, would justify the court's revision of Section 904. In any event, the "confusion" is completely the court's own invention.

Each of the cases presented here was initially brought against Bechtel alone (J.A. 1, 7, 9, 12, 15, 18, 20). Respondents did not seek an alternate third party to sue until after Bechtel was dismissed on its motion for summary judgment (which did not involve the LHWCA). At that point, any statute-of-limitations bar which respondents might have faced *had already occurred* and had no relationship whatever to the issue whether WMATA or the immediate employers were proper third parties.

Moreover, these respondents and the more than 80 plaintiffs below were represented in their compensation claims by the same counsel of record here. These attorneys cannot—and do not—deny that they knew of the wrap-up insurance program and its consequences long before they filed the complaints against Bechtel. They were plainly not "confused" and the court's supposition that they were cannot justify its decision.

Furthermore, wrap-up programs preclude any confusion about who purchased compensation coverage, because an employee (and his attorney) know for certain that the general contractor has done so. Under the two-step procedure set out by the Court of Appeals, on the other hand, an employee has no way of ascertaining at a given time whether this immediate employer or the general contractor purchased coverage. Should the employee assume that the general contractor successfully required his immediate employer to purchase coverage? Or should he assume that

the immediate employer failed to purchase coverage, that the general contractor *knew* of this failure and then purchased coverage? Or should he assume that both the general contractor and his immediate employer failed to purchase coverage, each mistakenly believing that the other did so? All three assumptions are possible and create confusion not found in a wrap-up program, where an employee knows for certain that the general contractor purchased coverage. Hence, if there is confusion presented in this case, it is the confusion which will flow from the Court of Appeals' own decision.

In summary, the Court of Appeals has, without justification, ignored the plain language of Section 904. That is enough to require reversal of its decision.

II. BY FULFILLING ITS STATUTORY DUTY UNDER LHWCA SECTION 904(a) TO SECURE AND PROVIDE COMPENSATION FOR METRO EMPLOYEES, WMATA BECAME ENTITLED TO IMMUNITY FROM THOSE EMPLOYEES' TORT SUITS UNDER LHWCA SECTION 905(a)

Since WMATA was required under Section 904(a) to secure workers' compensation coverage for respondents (and other Metro construction employees), it follows that WMATA is entitled under Section 905(a) to immunity from respondents' tort suits. Tort immunity has historically gone hand-in-hand with the obligation to secure compensation coverage. *See, e.g., Morrison-Knudsen*, 103 S. Ct. at 2052; *Pepco*, 449 U.S. at 281-282 & n.24. *See also* 2A A. Larson, *The Law of Workmen's Compensation* § 72.31(c), at 14-136 to 14-137. Indeed, even the Court of Appeals recognized that WMATA would be entitled to tort immunity if it had a statutory duty and followed the two-step process imposed by the court (Pet. App. 54a-55a). Moreover, construing the term "employer" in Section 905(a) to include the "contractor" referred to in Section 904(a) is supported by the principle that a statute

should be interpreted, where possible, so as to make its provisions internally consistent. See, e.g., *Morrison-Knudsen*, 103 S. Ct. at 2050-51; *Philbrook v. Glodgett*, 421 U.S. 707, 713 (1975); *Chemehuevi Tribe of Indians v. FPC*, 420 U.S. 395, 403 (1975). See further discussion at pp. 30-34, *infra*. Hence, assuming that the Court of Appeals' revision of Section 904 is reversed, it necessarily follows that its decision to deny WMATA immunity must also be reversed.

III. THE COURT OF APPEALS' DECISION WILL SUBVERT THE PURPOSES OF THE LHWCA

In *Pepco*, this Court stated that the federal courts may not rewrite or ignore the plain language of the LHWCA simply to avoid incongruities. 449 U.S. at 283. Here, not only has the lower court rewritten Section 904's compelling language, but that rewrite will itself produce widespread incongruities and inequities under the LHWCA. Indeed, as will be described, the Court of Appeals' decision threatens the very purposes of the LHWCA.³² This clearly requires reversal of that decision.³³

The purpose of laws such as the LHWCA and DCWCA, as this Court has long recognized, is to provide "for employees a remedy which is both expeditious and independent of proof of fault," and "for employers a liability which is limited and determinate." *Bradford Elec. Light Co. v. Clapper*, 286 U.S. 145, 159 (1932). *Accord, Cardillo v. Liberty Mutual Ins. Co.*, 330 U.S. 469, 476 (1947). As the Court has also recognized, in order to enjoy these benefits, both employers and employees must give up

³² Moreover, as described in Section IV, the decision will also produce numerous other results Congress could not have intended.

³³ *Director, OWCP v. Perini North River Associates*, 103 S. Ct. at 647 ("This Act must be liberally construed in conformance with its purpose and in a way which avoids harsh and incongruous results") (quoting *Voris*, 346 U.S. at 333); *Reed v. The Yaka*, 373 U.S. 410, 415 (1963).

something. Employers relinquish their tort defenses in exchange for absolute but specifically limited liability, while employees forego the opportunity for unlimited damage awards in return for certain, but limited, compensation awards.³⁴ To effectuate the trade-off, employers are assured that their no-fault compensation liability is exclusive, and that, accordingly, they are entitled to immunity from tort suits based on the same employee injuries.³⁵ This trade-off, or *quid pro quo*, is "central to the LHWCA, as adopted by the [DCWCA]." *Pepco*, 449 U.S. at 282 n.24; *accord*, *Morrison-Knudsen*, 103 S. Ct. at 2052.

In short, there are three overriding objectives of the LHWCA: (1) to ensure compensation benefits for all injured employees;³⁶ (2) to ensure that those benefits, albeit fixed and limited, are swiftly delivered to the injured employees;³⁷ and (3) to limit litigation concerning

³⁴ See *Morrison-Knudsen*, 103 S. Ct. at 2052; *Pepco*, 449 U.S. at 282, n.24; *New York Central R.R. v. White*, 243 U.S. 188, 201-204 (1917); J. Boyd, *A Treatise on the Law of Compensation for Injuries to Workmen Under Modern Industrial Statutes* 4 (1913); 1 A. Larson, *The Law of Workmen's Compensation* § 2.10.

³⁵ See e.g., *Morrison-Knudsen*, 103 S. Ct. at 2052; *Pepco*, 449 U.S. at 281-282; *Bradford Elec. Light Co.*, 286 U.S. at 159. See also *Lockheed Aircraft Corp. v. United States*, 103 S. Ct. 1033, 1036 (1983).

³⁶ See *Morrison-Knudsen*, 103 S. Ct. at 2052; *Cardillo*, 330 U.S. at 476.

³⁷ See *Morrison-Knudsen*, 103 S. Ct. at 2052 (the LHWCA envisions employees' receipt of payments "without the expense, uncertainty, and delay that tort actions entail"); *Pepco*, 449 U.S. at 282 (LHWCA is intended to insure employees a "prompt and certain recovery for their industrial injuries"); cf. *New York Central R.R.*, 243 U.S. at 197 (the expense and delay in litigating the facts of industrial accidents amount "in effect to a defeat of justice"); *Norton v. Warner Co.*, 321 U.S. 565, 568-569 (1944).

employee injuries.³⁸ In rewriting the statute, the Court of Appeals has completely ignored these statutory objectives and, as a consequence, has reached a decision that will in practice completely undermine each one of them.

A. The Court of Appeals' Decision Will Undermine Congress' Intent to Ensure Employee Compensation Coverage

The immediate and most damaging effect of the Court of Appeals' decision will be to jeopardize Congress' commitment to full compensation coverage for all employees at all times. WMATA's insurance guaranteed just such coverage. Yet under the Court of Appeals' approach, WMATA and other general contractors are enjoined from covering employees unless and until they "first require [their] subcontractors to purchase the insurance" (Pet. App. 54a). The court did not say what steps were necessary to qualify for the required coercion against the subcontractor, nor how long the general contractor should wait until concluding that the subcontractors had not in fact acquired the necessary coverage. Indeed, the Court of Appeals' decision provides a contractor *no standard at all* by which to determine when it has ceased being a "mere volunteer" under the LHWCA and has in fact acquired a duty to purchase coverage.³⁹

³⁸ See H.R. Rep. No. 1441, 92d Cong., 2d Sess. 5 (1972); *Rodriguez*, 451 U.S. at 616 (statutory changes adopted in the 1972 amendment "remind us that one of the purposes of the Act is to minimize the need for litigation as a means of providing compensation for injured workmen"); *Bloomer*, 445 U.S. at 86; cf. *New York Central R.R.*, 243 U.S. at 197 (the New York Worker's Compensation Act, on which the LHWCA was based, reflected concern that litigation was "unduly costly and tedious, encouraging corrupt practices and arousing antagonisms between employers and employees").

³⁹ For that reason, the Court of Appeals' two-step process leaves contractors at sea as to their statutory obligations, unlike contractors governed by state laws that have a defined two-step procedure

The Court of Appeals' standardless "rule" is particularly useless where, as here, WMATA *already knew* that some of its subcontractors would fail to acquire and maintain coverage, but *could never know* which subcontractors those would be. Thus, even had WMATA attempted to follow the Court of Appeals' approach, some subcontractors would no doubt have acquired insurance but then failed to maintain it, and others would never have been able to acquire it at all—and in both situations some coverage failures would not have been brought to WMATA's attention in time for it to supply the missing coverage.⁴⁰

It is therefore inevitable under the Court of Appeals' decision that gaps in coverage will result and that some employees will not have compensation insurance at the time of their injuries. It is also inevitable that some contractors, believing that they have not yet moved from the "volunteer" stage to the "duty" stage, will err on the side of not purchasing insurance.⁴¹ The result, of course, will be to increase still further the gaps in employee coverage.

spelling out the respective duties of contractors and subcontractors (see page 19, *supra*).

⁴⁰ WMATA might, for example, have required by contract that all its subcontractors purchase compensation insurance for all their employees. Indeed, as the Fifth Circuit recently recognized, by so acting a general contractor should be deemed to itself have "secured" compensation and therefore be entitled to employer immunity. *Nations v. Sun Oil Co.*, 695 F.2d 933 (5th Cir. 1983) (construing Mississippi workers' compensation statute identical to LHWCA Section 904). Here, WMATA went even further than did the general contractor in *Nations* because it knew that simply requiring its subcontractors to purchase insurance *would not guarantee coverage* for all Metro construction employees.

⁴¹ The Court of Appeals apparently was of the view that a general contractor would *relish* the opportunity to be liable for workmen's compensation, rather than be potentially liable as a third-party tortfeasor: "a general contractor may not circumvent the intended operation of the Act by * * * choosing between either securing workmen's compensation insurance and thereby obtaining statutory employer immunity, or remaining potentially liable as a third-party

Indeed, the Court of Appeals' decision not only will produce a disincentive for general contractors to acquire insurance, but will throw into question whether such contractors have "employer" responsibilities under the Act at all. WMATA had assumed that since it was required to step into the shoes of the employer for purposes of Section 904, it would be treated as an "employer" for purposes of making compensation payments, receiving "employer" immunity, and performing all other "employer" functions under the LHWCA necessary to ensure delivery of compensation benefits. The Court of Appeals, however, has cast doubt on that assumption; under that court's analysis, a "volunteer" such as WMATA has no "employer" duties under the Act. If the Court of Appeals is correct, WMATA (and its carrier) should be entitled to cease making any compensation payments at all. Indeed, if the lower court is right, general contractors may well avoid all responsibility under the LHWCA.

Thus, under Section 904, a "contractor" is "liable for and shall secure payment of" all compensation "payable under Sections 907, 908, 909" of the Act. The latter sections describe, respectively, the medical services, disability compensation, and death benefits made payable under the Act. However, only an "employer" is required under those sections to make those payments (*see* Sections 907(a) and 908(f)). Hence, unless a securing "contractor" is deemed to be an "employer" for purposes of those sections, such a contractor would never be required to make actual provision of the benefits it had secured. Under the Court of Appeals' approach, a volunteer "employer" such as WMATA would apparently have *no duty* to make payments. Obviously, Congress could not have intended such a result; rather, where a "contractor" has secured benefits

tortfeasor" (Pet. App. 54a). The court has badly misjudged the world of insurance premiums. It would have been *far less expensive* for WMATA to purchase liability insurance than to pay compensation insurance premiums. *See Best's Review*, Jan. 1984, at 94-96.

(under Section 904) and an injured employee appropriately seeks payment of those benefits, it was clearly Congress' intention to treat such a contractor as the "employer" under Sections 907, 908, 909 and to require that the contractor in fact pay the benefits guaranteed by those sections.

Moreover, to ensure effective delivery of those benefits, Congress established a number of penalties, employee-protective prohibitions, and judicial enforcement powers. Again, however, those penalties, prohibitions, and powers were made applicable only to "employers."

Thus, under Section 938 of the Act "any employer" (and its officers) failing "to secure the payment of compensation" required by Section 904 is subject to a fine of \$1000 and imprisonment of one year. Similarly, an "employer" is liable (under Section 948) for fines and damages if it discriminates in any way against an employee attempting to prosecute a claim under the Act. An "employer" is additionally subject to civil penalties (under Section 914(g)) for failing to file timely notice with the Secretary of Labor, of compensation payments made. Finally, an "employer" which unsuccessfully resists payment of a claim is subject (under Section 928) to payment of attorney and witness fees incurred by the employee. Yet, if a voluntary securing "contractor" is not treated as an "employer" under the cited sections, then all these sanctions are rendered nugatory in any case where such a contractor might otherwise have been liable for compensation payments under the Act. Under the Court of Appeals' decision, a contractor who had failed to require his subcontractor to obtain insurance would apparently never have been liable in the first place.

Furthermore, Congress provided that an "employer" may be required to make a deposit with the U.S. Treasurer to ensure prompt compensation payments (Section 914(i)) and to post a bond when it seeks to secure payment by qualifying as a self-insurer (Section 932(a)(2));

no "employer" may require any employee to pay any portion of compensation insurance premiums (Section 915); an employee entitled to compensation shall have a lien against its "employer['s]" assets and shall have priority in the event of that employer's insolvency or bankruptcy (Section 914); an "employer['s]" bankruptcy or insolvency will not relieve its insurance carrier of liability for compensation payments (Section 936(a)); the Secretary may "in the interest of justice" approve a lump-sum payment to an employee in discharge of "the liability of the employer for compensation" (Section 914(j)); and a "special fund" for the benefit of employees shall be established and financed in part by "employer" payments and fines (Section 944). All of these sections were plainly intended to benefit employees entitled to compensation under the Act; nevertheless, none of them would apply to a securing "contractor" unless that contractor is treated as a statutory "employer" under the cited sections. And the contractor would apparently not be an "employer" where it had not met the Court of Appeals' test.

Finally, where the "employer" defaults on compensation payments alleged to be due under the Act, the affected employee may seek relief in the federal District Court where the "employer" has its principal place of business or maintains an office (Section 918(a)). In addition, where a resulting judgment cannot be satisfied due to "the employer's insolvency or other circumstances precluding payment," the Secretary may make payments to the employee from the Section 944 "special fund" (Section 918(b)). To the extent that any such "special fund" payments are made, the Secretary is subrogated to the employee's rights "against the employer" (*id.*). An employee has similar enforcement rights in the federal District Court against "any employer" failing to comply with any compensation order issued under the Act (Section 921). However, Congress specifically provided that proceedings for enforcement of compensation orders "shall not be instituted other than as provided in [Section 921] and

Section 918" (Section 921(c)). Hence, since those two sections authorize proceedings only against an "employer," an injured employee would be denied all payment-enforcement rights against a securing contractor unless that contractor is treated as an "employer" for purposes of those sections. Congress must have intended the employee to have those rights even where his general contractor secured the compensation. It is not at all clear that he would have them under the Court of Appeals' decision.

WMATA submits that, where a contractor has had a duty to secure compensation payments under Section 904 and thereafter is asked to pay out the benefits thus secured, the only sensible construction of the Act—the only one that will ensure effective delivery of the legislated employee benefits—is to treat such a "contractor" as a statutory "employer" under the Act in every section that relates to the duty to secure and pay compensation.⁴² This includes, of course, the "employer" immunity conferred by Section 905.⁴³ As Professor Larson has stated, "[s]ince the general contractor is * * * in effect made the employer for purposes of the compensation statute, it is obvious that he should enjoy the regular immunity of an

⁴² It is not our position, of course, that a contractor should thereafter be treated as an "employer" for *all* other purposes under the LHWCA. Such a construction would run counter to the Act's concept that the employer, both in fact and in law, is responsible for the normal incidents of employment. Rather, our contention is that once a claim for compensation is filed and notice is received by the securing contractor's insurer, the contractor should be treated as a statutory "employer" under all sections of the Act which regulate the processing of the claim and the payment of any benefits which are due.

⁴³ The federal regulations implementing the LHWCA are in accord. See 20 C.F.R. § 701.301(a)(13) (1983) (defining "employer" for the purposes of the Act as "any employer who may be obligated as an employer under the provisions of the LHWCA as amended or any of its extensions [*e.g.*, DCWCA] to pay and secure compensation as provided therein") (emphasis added).

employer * * *." 2A A. Larson, *The Law of Workmen's Compensation*, § 72.31(a), at 14-112. But under the Court of Appeals' approach, it is open to question whether a contractor would ever have an obligation as an "employer" at all. Such a contractor apparently needs only to *fail* to require its subcontractor to acquire insurance and thereby escape responsibilities under the LHWCA altogether.⁴⁴

Alternatively, such a contractor may in good faith purchase insurance, yet learn later that it had not taken sufficient steps, under the Court of Appeals' test, to force the subcontractor to purchase insurance; at that point, the contractor would surely conclude that if it had no duty to purchase insurance, it likewise had no duty to pay compensation. Worse, the involved subcontractor would not itself have purchased insurance, because it would have believed, also in good faith, that the contractor's insurance would suffice to cover any injured worker. Hence, in this all-too-likely situation, even though both the contractor and subcontractor had attempted to follow the Court of Appeals' decision, injured workers would be left without assured compensation benefits.

These results are diametrically opposed to the full employee coverage contemplated by Congress. The Court of Appeals has simply failed to appreciate that the LHWCA, like all statutes, must be construed with a view toward the practical implementation of its stated purposes.⁴⁵ Here, WMATA's attempted implementation of the statute is the *only* sensible, practical approach to achieving the statute's purpose: recognizing on the basis

⁴⁴ It is no answer to say that by failing to secure compensation a general contractor might be subject to sanctions under Section 938 of the LHWCA. That section applies only to "any employer required to secure the payment of compensation under this Act." Under the Court of Appeals' decision, WMATA was not required to secure compensation (let alone pay compensation).

⁴⁵ See, e.g., *American Tobacco Co. v. Patterson*, 456 U.S. at 66; *Commissioner v. Brown*, 380 U.S. 568, 571-576 (1965); 2A Sutherland, *Statutory Construction*, § 45.12 (4th ed. 1973).

of past experience that some of its hundreds of subcontractors and their sub-subcontractors would not secure coverage, it acquired coverage for *all* Metro construction employees, still leaving to those subcontractors who wished to do so the opportunity to purchase insurance themselves.⁴⁶ WMATA's approach will ensure full coverage. The Court of Appeals' standardless rule virtually guarantees that such full coverage will not be achieved.

B. The Court of Appeals' Decision Will Undermine Congress' Intent to Ensure Swift Delivery of Benefits

Denying WMATA immunity will also inevitably frustrate the LHWCA's important interest in assuring employees a prompt and certain disposition of claims and award of benefits. See, e.g., *Morrison-Knudsen*, 103 S. Ct. at 2052; *Cardillo*, 330 U.S. at 476; *Norton v. Warner Co.*, 321 U.S. 565, 568-569 (1944). At present, Metro construction employees can generally obtain compensation benefits without protracted administrative or judicial litigation. That would also appear to be true for employees in general. Less than 5% of all claims require administrative adjudication, and less than 0.1% of all claims reach the Courts of Appeals. *Id.* & n.13; Report of the Comptroller General of the United States, *Longshoremen's and Harbor Workers' Compensation Act Needs Amending* 5, 21, 41 (Apr. 1982). But denying contractors like WMATA immunity from tort suits will surely increase the number of disputes requiring administrative resolution. If they must contemplate subsequent tort suits, contractors will have a greatly enhanced incentive to contest an employee's compensation claims in order to avoid conceding that an employee's injury is work-related, and to avoid providing funds for

⁴⁶ J.A. 283. These record facts contradict the Court of Appeals' completely unsupported conclusion that WMATA acted in order to "preempt" the activity of subcontractors to purchase insurance. See also note 41, *supra*.

the tort suit itself.⁴⁷ A ruling in favor of respondents, therefore, will invite delay in each individual case as well as substantially increase the number of claims subject to these delays.⁴⁸ Any interpretation of Section 904 which threatens to delay so substantially the award of benefits is flatly inconsistent with Congress' intent.

C. The Third-Party Actions Invited by the Court of Appeals Will Create an Unmanageable Litigation Explosion in the Courts Below

The decision below invites any compensation claimant to bring a third-party action against the general contractor, even though the contractor secured the payment of that claimant's compensation benefits. To date, there have been 22,000 compensation claimants, and the Court of Appeals' decision has created a massive spate of third-party actions against WMATA that are continually being filed and have congested the United States District Court for the District of Columbia.⁴⁹ Over 80 suits are now pending against WMATA in that court. More suits are being filed at the rate of two to four per week. Approximately 30 suits are pending in the local court of the District of Columbia, and the plaintiffs in those actions have recently been allowed to add WMATA as a new party defendant.⁵⁰ (The counsel for these numerous plaintiffs

⁴⁷ See S. Rep. No. 1115, 92d Cong., 2d Sess. 4 (1972).

⁴⁸ An increase nationwide of merely 5% in the number of cases requiring formal administrative adjudication would double the number of cases the LHWCA administrative system must resolve at a time when that system is already severely overburdened. See Report of the Comptroller General of the United States, *Longshoremen's and Harbor Workers' Compensation Act Needs Amending*, at 30-32.

⁴⁹ Every active judge of the District Court has been assigned these actions, each of which will involve months of complex discovery and require weeks to try.

⁵⁰ WMATA will remove those cases to the United States District Court pursuant to § 81 of the WMATA Compact, D.C. Code Ann., § 1-2431[81] (1981).

are the same counsel of record for the respondents in these cases.) Nor is there any foreseeable end to this litigation. The District of Columbia employs the liberal "discovery rule," which withholds commencement of the limitations period until the plaintiff receives a formal diagnosis of the specific injury alleged in his complaint.⁵¹ Consequently, WMATA will be defending itself against these claims for many years hence if the decision below is not reversed.

Moreover, the expected suits against WMATA are only the beginning of the litigation explosion the Court of Appeals' decision will ignite. That decision allows an injured employee to sue any and all intermediate contractors as well as the general contractor. For example, the employee of a sub-subcontractor can apparently sue the sub-contractor, the contractor, and the general contractor for the same injury.

Furthermore, there will be litigation directly resulting from any gaps in coverage caused by the inevitable termination of wrap-up programs after the Court of Appeals' decision. Section 904 provides injured employees the right either to demand compensation payments or to bring negligence actions against their immediate employers. Undoubtedly, many employees will elect to use the latter alternative, particularly since the affirmative defenses of contributory negligence, assumption of the risk, and the fellow-servant rule will be unavailable to the defendant. See Section 905(a). Thus, the practical result of the Court of Appeals' decision will be virtually to guarantee that in all cases of multi-tier employers there will be a third-party tort suit, regardless of who provides compensation coverage.

Finally, if general contractors such as WMATA are to be denied immunity as a *quid pro quo* for their pur-

⁵¹ See *Wilson v. Johns-Manville Sales Corp.*, 684 F.2d 111 (1982).

chase of compensation coverage, they will naturally seek indemnification agreements from their subcontractors for any negligence claims brought by the latter's employees. Litigation concerning such agreements will inevitably arise and further burden the court system.⁵² Indeed, it was this very category of lawsuits that led to the addition of Section 905(b) to the LHWCA, which precludes such indemnity agreements in maritime situations. Since that provision does not apply to land-based actions, however,⁵³ the court congestion formerly experienced in maritime actions will now be revived in all those cases where land-based general contractors are denied immunity.

At this late date, it hardly needs to be repeated that the litigation that will be formented by the Court of Appeals' decision was precisely what Congress intended through the LHWCA to prevent.⁵⁴ Indeed, both this Court and the Congress have found that third-party LHWCA actions needlessly reduce the available funds to pay compensation claims, and that the "primary beneficiaries" of such actions are lawyers, not injured employees.⁵⁵ The decision below will simply not assist injured employees in the way Congress intended.

⁵² Dramatic demonstration of the congestion resulting from just such actions was set forth by the court in *Turner v. Transportacion Maritima Mexicana S.A.*, 44 F.R.D. 412 (E.D. Pa. 1968).

⁵³ See, e.g., *Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256, 272, n.31 (1979).

⁵⁴ *Rodriguez*, 451 U.S. at 616; *Bloomer*, 445 U.S. at 83; *New York Central R.R.*, 243 U.S. at 197.

⁵⁵ *Bloomer*, 445 U.S. at 83-86; *Hearings on H.R. 247 et al. Before a Select Subcomm. on Labor of the House Comm. on Education and Labor*, 92d Cong., 2d Sess. 106 (1972).

IV. THE COURT OF APPEALS' DECISION WILL PROVIDE NUMEROUS OTHER RESULTS NOT INTENDED BY CONGRESS, INCLUDING THE PREVENTION OF LOW-COST EMPLOYER COVERAGE, THE CREATION OF CONFLICTING EMPLOYEE RECOVERIES WITHIN THE THREE WMATA COMPACT JURISDICTIONS, AND THE REDUCTION OF MINORITY CONTRACTOR INVOLVEMENT IN CONSTRUCTION PROJECTS

The Court of Appeals' decision not only contradicts the plain language and announced purposes of the LHWCA, but will also produce at least three anomalous results not intended by Congress: the prevention of wrap-up programs such as that used by WMATA, with all its attendant employee and public benefits; divergent liability for WMATA within the interstate Metro System (Maryland, Virginia and the District of Columbia); and the reduction of the number of minority contractors who can participate in construction projects affected by the LHWCA.

A. The Court of Appeals' Decision Will Mark the End of Wrap-Up Programs in Projects Subject to the LHWCA

Without record support, the Court of Appeals has attacked the integrity of wrap-up programs. Its decision will severely diminish the use of this valuable and widely-approved form of comprehensive insurance coverage for large-scale construction projects. Because of the manifold benefits that wrap-up programs provide in a manner that cannot be duplicated by multiple, individual insurance policies,⁸⁸ they are now universally em-

⁸⁸ Among the many advantages of wrap-up programs are the following:

Administration. Since all contractors have the same coverage, limits, and policy terms, there is no necessity to review many policies for each construction contract to make certain that coverages afforded are in compliance with contract requirements.

[Footnote continued on page 40]

ployed in large construction projects involving numerous contractors, subcontractors, and sub-subcontractors (J.A.

⁵⁶ [Continued]

Claim Handling. Since the same insurance carrier and staff adjust all claims, this assures a constant uniformity of claims handling for the entire project and eliminates the inconsistencies that would prevail if there were more than one carrier.

Loss Control Engineering. Loss prevention and inspection service are also subject to uniformity because one company supplies the service. This eliminates the variable approach that would be used under conventional methods.

Duplication of Insurance Costs. Only one premium is charged to cover all prime and subcontractors. The alternative would require these contractors, regardless of tier, to supply their own coverages, thus pyramiding insurance costs.

Elimination of Cross-Liability Litigation. The interfacing of one project with another often generates claims by one contractor against another—an expense which carriers anticipate and include in their premiums. This is avoided in the wrap-up program.

Avoidance of Construction Delays. The availability of insurance varies from day to day, and its cancellation, either before or at renewal dates, is always a possibility. If a contractor cannot obtain the coverage required by contract or by law, the construction work must stop. This possibility is eliminated under the wrap-up approach.

Participation by Small and Minority Contractors. As described below, coverage for the majority of these contractors is either not available or is so expensive that it would preclude their participation in the project. The wrap-up program not only provides them an opportunity to participate but assists them in developing greater construction expertise.

Costs. The wrap-up program is primarily loss responsive. That is, each dollar of claim requires a dollar of premium. Charges for the insurance company's expenses and profit have been eliminated. Thus, virtually all premium dollars are used for claim payments.

See, e.g., General Services Administration, *Wrap Up Study* 5-6, 9-10, 11-12, 25 (Aug. 22, 1975); Becker & Denenberg, *Wrap-Up of the Wrap-Up*, CPCU Annals 200 (Sept. 1967). Thus, in addition to meeting WMATA's Section 904(a) duty, wrap-up insurance substantially lessens WMATA's administrative burden and effectuates a substantial savings in costs (J.A. 264). It frees WMATA's public officials to perform other duties, and it lessens the cost to the public of constructing the system—costs that will not be recaptured by future profits (J.A. 291).

286). That wrap-up programs are widely viewed as a valuable method for providing compensation coverage is demonstrated by the fact that they have been approved in one form or another for use in urban transportation construction projects by at least 23 States and the District of Columbia,⁵⁷ and are used in a majority of large construction projects in the nation.⁵⁸ Indeed, a recent Department of Transportation study concluded that urban transit "[p]rograms and projects of a size greater than \$60,000,000 *should be* [comprehensive insurance programs]" like WMATA's.⁵⁹

Moreover, the savings of public funds resulting from its wrap-up program have enabled WMATA to increase the mileage of the system at a time when both federal and state support for mass transit is declining.⁶⁰ In addition, the cost savings resulting from wrap-up insurance may be used to finance a centralized safety program to ensure better loss prevention planning.⁶¹ WMATA's wrap-up insurance program does, in fact, use its savings to implement a Coordinated Safety Program, which has become the most successful in the nation.⁶²

⁵⁷ Barrett, *Insurance for Urban Transportation Construction*, at A-1 to A-4.

⁵⁸ See Becker & Denenberg, *Wrap-Up of the Wrap-Up*, at 201.

⁵⁹ Barrett, *Insurance for Urban Transportation Construction*, at 6-1 (emphasis added).

⁶⁰ Even before WMATA began the Phase II construction of Metro, it was estimated that wrap-up would save taxpayers at least \$60 million. See *Subway Insurance Becomes an Issue*, Wash. Evening Star, Feb. 4, 1970, at B1. From 1971 to 1976, WMATA's wrap-up program resulted in an estimated savings in excess of \$32 million of public funds. Barrett, *Insurance for Urban Transportation Construction*, at 8-18.

⁶¹ See, e.g., Sullivan, *Casualty Insurance for Contractors*, *The Constructor* 48 (April 1962).

⁶² See, e.g., "Wrap-up Insurance Program at Washington Metro Cuts Insurance Cost, Boosts Worker Safety," *Civil Engineering-ASCE* 88-89 (April 1978). WMATA's Coordinated Safety Program and Reporting Procedures manual is set forth at J.A. 132-161.

This safety program keeps the responsibility for safety on the contractors, and it employs the National Loss Control Service Corporation ("NATLSCO"), on behalf of WMATA, as an assistant in the field to promote effective safety among all contractor personnel (J.A. 133, 141-143). NATLSCO personnel supplement the safety services provided by WMATA's construction agent in the field.⁶³ Savings from the wrap-up program are also utilized in the safety program to provide an actual financial incentive through money awards for those subcontractors who meet WMATA's goal of accident-free construction (J.A. at 159-160).

Most important, WMATA's wrap-up program was specifically brought to Congress' attention prior to its implementation in 1971.⁶⁴ Shortly after implementation, WMATA's wrap-up program was favorably reviewed by the House Appropriations subcommittee that oversees the federal funding of the entire WMATA project, which includes the funding of the wrap-up program.⁶⁵ Since that

⁶³ Bechtel's role in the Coordinated Safety Program is set forth at J.A. 146 and is briefly discussed in the Court of Appeals' decision (Pet. App. 47a-49a).

⁶⁴ Two members of Congressional House and Senate Committees for the District of Columbia questioned whether WMATA should adopt a wrap-up program. See *Subway Insurance Becomes An Issue*, Wash. Evening Star, Feb. 4, 1970, at B1. The Chairman of the House District Committee, Rep. John L. McMillan, introduced a bill to preclude the use of wrap-up programs in the District of Columbia. H.R. 15627, 91st Cong., 2d Sess. (1970). The District of Columbia opposed the bill, noting that wrap-up programs could "save public money and result in more complete coverage for all concerned" and that wrap-up programs "would make it easier for smaller companies to participate in public construction projects." Letter to The Honorable John L. McMillan from Mr. Graham W. Watt, Asst to the Commissioner, dated April 3, 1970, and submitted at the April 7, 1970, hearing. A copy of Mr. Watt's letter is included in the Appendix to the National Association of Minority Contractors' Brief *Amicus Curiae*. The bill died in committee.

⁶⁵ See *Hearings on Appropriations Before a Subcomm. of the House Comm. on Appropriations*, 92d Cong., 2d Sess. 408, 417-419 (Mar. 30, 1972).

time, Congress has continued to fund the wrap-up program.⁶⁶

Congress' continuing decision to fund WMATA's wrap-up program has proven successful. For over a decade, that program has been responsible for carrying out the primary purpose of the LHWCA and DCWCA by assuring Metro construction laborers of continuous compensation coverage, thereby avoiding the problems occasioned by the history of failures by some of WMATA's subcontractors in obtaining or maintaining their own insurance. At no time prior to this case had anyone ever contended that WMATA had somehow "frustrate[d] the operation of the Act" (Pet. App. 54a) by employing a beneficial, widely-used, and congressionally-funded program of workers' compensation insurance. In these circumstances, WMATA's reasonable, settled expectations that it has been advancing the purposes of the Act, as well as the substantial benefits to contractors, subcontractors, and employees from use of these programs, ought not to be defeated absent some clear Congressional intent to the contrary. See *Morrison-Knudsen*, 103 S. Ct. at 2052; *J.W. Bateson Co. v. United States ex rel. Board of Trustees*, 434 U.S. 586, 593 (1978). See also *Zenith Radio Corp. v. United States*, 437 U.S. 443, 457-458 (1978).

Although the Court of Appeals dismissed as unimportant the undisputed fact that WMATA's insurance program substantially lessened its administrative burden and effectuated a substantial savings in public funds (Pet. App. 55a), it is certain that Congress would not and has not treated this consideration so lightly. Indeed, we suggest that Congress would be astounded to learn that the millions of dollars it has approved for the successful wrap-up insurance program were mere *voluntary contributions* by WMATA to workers who retain the right to sue WMATA for additional compensation for the same injuries. The Court of Appeals' decision necessarily im-

⁶⁶ See note 68, *infra*.

plies that that was Congress' intention. The court is clearly wrong and ought to be reversed.

B. The Court of Appeals' Decision Will Subject WMATA to Divergent Liability Within the Interstate Metro System

The Court of Appeals' decision will also create a significant conflict in the recoveries of similarly situated Metro employees. Both Maryland and Virginia clearly bar suits against a general contractor in the circumstances presented here.⁶⁷ The court's decision, therefore, has the anomalous effect of denying WMATA immunity *only* for suits that arise in the District of Columbia. That result is intolerable for an interstate agency like WMATA, for whom uniformity in the applicable law is essential. See *Virginia-Maryland Amicus Curiae* Br. 4-8.

C. The Court of Appeals' Decision Will Prevent the Bulk of Minority Contractors from Participating In Major Construction Projects Subject to the LHWCA

Finally, the Court of Appeals completely disregarded the effect of its decision on minority-owned and -operated companies, and on WMATA's statutory duty to employ such concerns. As the *amicus* National Association of Minority Contractors ("NAMC") has explained in detail, "[t]he decision below will markedly decrease and probably end the participation of minority contractors in the WMATA project" by, first, "destroy[ing] an insurance program that removed an insurmountable impediment to the participation of minority contractors: the high, and often prohibitive cost of compensation coverage for their

⁶⁷ See, e.g., Va. Code Ann. §§ 65.1-30 & -40 (1980); *Evans v. Newport News Shipbuilding & Dry Dock Co.*, 361 F.2d 364 (4th Cir. 1966); *Anderson v. Thorington Constr. Co.*, 201 Va. 266, 110 S.E.2d 396 (1959), *appeal dismissed for want of a properly presented substantial federal question*, 363 U.S. 719 (1969); Md. Code Ann. Art. 101, § 62 (Michie 1979); *State ex rel. Reynolds v. City of Baltimore*, 86 A.2d 618 (Md. 1952).

employees," and, second, by "drastically reduc[ing] the available federal funds for project construction, because funds must be shifted to cover the costs of the third-party litigation invited by the opinion below" (NAMC Br. 2-3).

WMATA is required by law to provide minority-run companies a maximum opportunity for participation in the construction of the Metro System (J.A. 205-206, 285).⁶⁸ Most minority companies engaged by WMATA are small, relatively new concerns which lack the profit margin of larger, more established companies. Because of their relative lack of capital to guarantee continuous and timely premium payments, as well as their brief accident history against which their risk can be measured, these minority firms must often pay a higher compensation insurance premium to obtain coverage from established insurance companies than more established firms with greater equity are forced to pay. In fact, minority companies often cannot obtain compensation insurance from established insurance companies even by paying higher insurance premiums. Hence, if they are

⁶⁸ J.A. 285. Approximately 80% of the construction costs of the Metro Transit System have been subsidized by the transfer of federal Interstate Highway Funds, direct federal lump sum payments, and continuing grants under the Urban Mass Transportation Act of 1964, 49 U.S.C. § 1604. See National Capital Transportation Act Amendments of 1979, Pub. L. No. 96-184, 93 Stat. 1820; see also S. Rep. No. 475, 96th Cong., 1st Sess. (1979). Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d (1976), prohibits any discrimination in federally-funded programs. A similar prohibition is included in Section 12 of the Urban Mass Transportation Act of 1964, as amended, 49 U.S.C. § 1608(f) (1976). The Department of Transportation regulations implementing these statutes require the recipient of federal funds, such as WMATA, to ensure that minority business enterprises have the maximum opportunity to participate in federally-funded projects. See 49 C.F.R. §§ 23.1, *et seq.* The District of Columbia and WMATA have furthermore sought to increase minority participation to levels in excess of those required by the federal government. See, e.g., *Metro Is Urged to Set Minority Goals Higher*, Wash. Post, Nov. 24, 1983, at B2.

to have any possibility of participating in WMATA's projects by purchasing workers' compensation insurance themselves, these companies must turn to smaller, financially-weaker, and, as it sometimes turns out, unreliable insurance companies to obtain compensation coverage (J.A. 285-286). That alternative is fraught with risk because employees of such minority companies will be left without any compensation coverage if the insurance company fails (J.A. 265, 285). In addition, denying contractors immunity may encourage them to perform work themselves that they would otherwise let out to a minority subcontractor (*see* NAMC Br. 12).

WMATA's wrap-up program was designed in part to eliminate these problems (J.A. 284-286). Through that program, WMATA is able to provide minority businesses with the opportunity to compete for WMATA's construction projects without the risk that the employees of such firms may be left without compensation coverage (*see generally* NAMC Br.). In that way, WMATA is able not only to satisfy its affirmative action requirements but also to advance the recommendations of the federal government to increase minority participation in the construction industry. For instance, the Urban Mass Transportation Administration of the Department of Transportation has recommended that applicants for federal funding, like WMATA, consider "providing wrap-up insurance for contractors and subcontractors" as a means "to overcome barriers to [minority] program participation" in federally-funded construction projects. Urban Mass Transportation Administration, Department of Transportation, Circular C1165.1, at 14 (Dec. 30, 1977), *superseded by* 49 C.F.R. § 23.45, app. A (1983).⁶⁰ The decision below makes it impossible for WMATA to follow that recommendation.

⁶⁰ *See also* Barrett, *Insurance for Urban Transportation Construction*, at 1-21 (recommending wrap-up programs to encourage minority participation in major construction projects); General Services Administration, *Wrap Up Study* 14 (Aug. 22, 1975) (same).

CONCLUSION

The Court of Appeals' judgment is contrary to the plain language of the LHWCA, and will, in practice, subvert the purposes of the LHWCA, produce conflicting interstate recoveries within the Metro system, and debilitate the Congressionally-endorsed wrap-up and minority-hiring programs. It should therefore be reversed and the case remanded with direction to reinstate the judgments of the District Court dismissing the complaints.

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ALEXANDER L. STEVENS

CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1983

WASHINGTON METROPOLITAN AREA
TRANSIT AUTHORITY,

Petitioner,

v.

PAUL D. JOHNSON, *et al.*

Respondents

On Writ Of Certiorari To The United States Court
Of Appeals For The District Of Columbia Circuit

BRIEF FOR THE RESPONDENTS

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QUESTIONS PRESENTED

(i) Whether Section 905(a) of the Longshoremen's and Harbor Workers' Compensation Act extends immunity from suit to the owner of a construction project who voluntarily provides a wrap-up insurance plan for the benefit of contractors and sub-contractors, despite the plain language of Section 905(a) limiting such immunity to the immediate employer of the injured employee.

(ii) Whether an injured construction worker may be barred from pursuing his common law right to sue a third person, despite the plain language of Section 933(a) of the Longshoremen's and Harbor Workers' Compensation Act preserving that right.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	vi
ADDITIONAL RELEVANT STATUTES	1
COUNTERSTATEMENT	1
SUMMARY OF ARGUMENT	5
ARGUMENT	7
I. Only The Immediate Employer And Persons In His Employ Are Entitled To Immunity From Suit By The Employer's Injured Employee Under Sections 905 and 933 Of the Longshoremen's And Harbor Workers' Compensation Act.	7
A. The plain language of sections 905(a), 933(a) and 933(i) of the LHWCA extends immunity from suit only to employers who secure payment of compensation to their employees, and to offic- ers and employees of such employers.	7
B. The legislative history of the LHWCA and the provisions of and decisions under the New York Compensation Law, upon which the Act is based, confirm that Congress intended to ex- tend immunity only to the injured worker's em- ployer and fellow employees.	9
II. Neither Contractors, Who Have A Secondary, Con- tingent Obligation To Secure Payment Of Workers' Compensation Benefits To Employees Of Sub- contractors, Nor Owner-Contractees, Such As WMATA, Who Have Neither A Primary Nor A Secondary Duty To Secure The Payment Of Work- ers' Compensation Benefits For Employees Of Sub- contractors, Are Entitled To Immunity From Suit By Employees Of Subcontractors.	15
A. The Court of Appeals correctly decided that contractors have merely a secondary, con- tingent obligation to secure the payment of compensation under section 904(a) to employ- ees of subcontractors.	15

Table of Contents Continued

	Page
1. The plain language of the Act requires every employer, including subcontractors, to secure the payment of compensation to its employees.	15
2. The legislative history of the Act supports the conclusion that section 904(a) places only a secondary, guarantee-like liability on a contractor to employees of its subcontractors.	17
B. The Court of Appeals correctly concluded that WMATA's secondary duty to purchase workers' compensation coverage was not invoked under the facts of these cases, and that the voluntary purchase of such coverage does not confer immunity from suit.	19
1. Because the coordinated insurance program was designed not to satisfy any obligation on the part of WMATA, but rather the obligations of Metro contractors, only the contractors may attempt to claim immunity thereunder.	19
2. WMATA instituted the coordinated insurance program not because subcontractors failed to satisfy their statutory obligations, but for reasons of administrative efficiency and cost savings.	20
3. The voluntary purchase of workers' compensation insurance on behalf of another employer does not, and should not, confer immunity from suit.	22
C. Since WMATA is not a contractor, but an owner-contractee, it has neither a primary nor secondary obligation to provide workers' compensation coverage.	23

Table of Contents Continued

	Page
III. The Appellate Case Law Unanimously Supports The Conclusion That Petitioner Is Not Immune From Suit Under Sections 904(a) and 905(a).	27
IV. Contrary To The Allegations Of Petitioner, The Court Of Appeals' Decision Promotes The Purposes Of The Longshoremen's And Harbor Workers' Compensation Act.	30
A. The Court of Appeals' decision will promote rather than undermine Congress' intent to ensure employee compensation coverage and allow third party actions except against the employer.	30
B. The Court of Appeals' decision should not impede the delivery of benefits under the LHWCA.	32
C. The third party actions allowed by the Court of Appeals are a remedy that has been permitted by the LHWCA since its inception.	33
V. The Court Of Appeals' Decision Will Produce None Of The Anomalous Results Alleged By Petitioner, And Such Considerations Do Not, In any Event, Justify Ignoring the Plain Language Of The Act Or The Clear Intent Of Congress.	35
A. Wrap-up will be terminated only if the contractors and subcontractors covered thereunder are found not to have Secured compensation within the meaning of Section 904(a), thus subjecting them to suit as a third party or to an elective remedy under section 905(a).	36
B. Whether the Court of Appeals' decision will subject WMATA to divergent liability within the Metro System is irrelevant to the interpretation of the LHWCA.	38
C. The Court of Appeals' decision will not affect the participation of minority contractors in Metro Contracting and such participation, though of value to society, is in any event not relevant to the interpretation of sections 904(a) and 905(a) of the LHWCA.	40

Table of Contents Continued

	Page
VI. If Immunity Is Granted To WMATA, That Immunity Should Extend Only To Suits Based On Tortious Acts Committed By WMATA and Its Officers And Employees.	41
CONCLUSION	44

TABLE OF AUTHORITIES

CASES:	Page
<i>Administrator, FAA v. Robertson</i> , 422 U.S. 255 (1975)	44
<i>American Tobacco Co. v. Patterson</i> , 456 U.S. 63 (1982)	23
<i>Bassett Furniture Industries, Inc. v. McReynolds</i> , 216 Va. 897, 224 S.E.2d 323 (1976)	39
<i>Bloomer v. Liberty Mutual Insurance Co.</i> , 445 U.S. 74 (1980)	8, 12, 34
<i>Bowman v. Redding & Co.</i> , 449 F.2d 956 (D.C. Cir. 1971)	15
<i>Burns v. Alcala</i> , 420 U.S. 575 (1975)	23
<i>Cannon v. University of Chicago</i> , 441 U.S. 677 (1979)	11
<i>Clark v. Monarch Engineering Co.</i> , 248 N.Y. 107, 161 N.E. 436 (1928)	10, 11, 28
<i>Consumer Product Safety Comm'n. v. GTE Sylvania, Inc.</i> , 447 U.S. 102 (1980)	8
<i>Czaplicki v. The Hoegh Silvercloud</i> , 351 U.S. 525 (1955)	32
<i>DiNicola v. George Hyman Construction Co.</i> , 407 A.2d 670 (D.C. App. 1979)	27, 35
<i>Director, OWCP v. Perini North River Associates</i> , 103 S. Ct. 634 (1983)	11, 42
<i>Director, OWCP v. Rasmussen</i> , 440 U.S. 29 (1979)	7, 8
<i>Edwards v. Bechtel Associates Professional Corp., D.C.</i> 466 A.2d 436 (D.C. App. 1983)	38
<i>Fiore v. Royal Painting Co.</i> , 398 So.2d 863 (Fla. App. 1981)	27, 28, 29
<i>Gilmore v. Peter Kiewit Sons Co., Inc.</i> , No. 83-DCWC-89 (Feb. 23, 1984)	33
<i>Herd & Co. v. Krawill Machinery Corp.</i> , 359 U.S. 297 (1959)	7
<i>Honaker v. W. C. & A. N. Miller Dev. Co.</i> , 278 Md. 453, 365 A.2d 287 (Md. 1976)	39
<i>Honaker v. W. C. & A. N. Miller Dev. Co.</i> , 285 Md. 216 401 A.2d 1013 (Md. 1979)	39
<i>Jones and Laughlin Steel Corp. v. Pfeifer</i> , 103 S. Ct. 2541 (1983)	14, 43
<i>Lindler v. District of Columbia</i> , 502 F.2d 495 (D.C. Cir. 1974)	43

Table of Authorities Continued

Page

<i>Martin v. George Hyman Construction Co.</i> , 395 A.2d 63 (D.C. App. 1978)	28
<i>Morrison-Knudsen Construction Co. v. Director</i> , OWCP, 103 S. Ct. 2045 (1983)	7
<i>Morton v. Mancari</i> , 417 U.S. 535 (1974)	43
<i>Potomac Electric Power Co. v. Director</i> , OWCP, 449 U.S. 268 (1980)	7, 9, 10
<i>Probst v. Southern Stevedoring Co.</i> , 379 F.2d 763 (5th Cir. 1967)	4, 15, 27, 28
<i>Rodriguez v. Compass Shipping Co.</i> , 451 U.S. 596 (1981)	7, 8, 12, 27, 34, 38
<i>Shaw v. North Pennsylvania R. Co.</i> , 101 U.S. 557 (1879)	7
<i>Shell Oil Co. v. Leftwich</i> , 212 Va. 715, 187 S.E.2d 162 (1972)	39
<i>Sweezy v. Arc Electrical Construction Co.</i> , 295 N.Y. 306, 67 N.E.2d 369 (1946)	12, 13, 28
<i>Thomas v. George Hyman Construction Co.</i> , 173 F. Supp. 381 (D.D.C. 1959)	4, 12
<i>United States v. Borden Co.</i> , 308 U.S. 188 (1939)	43
<i>Vandergrift v. United States</i> , 500 F. Supp. 237 (E.D. Va. 1979), <i>aff'd</i> 634 F.2d 628 (4th Cir. 1980)	39
<i>Voris v. Eikel</i> , 346 U.S. 328 (1953)	42
<i>Walker v. Bechtel Associates Prof. Corp.</i> , D.C., No. 81- 1125 (D.D.C. Feb. 4, 1982)	2, 35
<i>Warren v. Dorsey Enterprises</i> , 234 Md. 574, 200 A.2d 76 (1964)	39
<i>WMATA v. Mergentime Corp.</i> , 626 F.2d 959 (D.C. Cir. 1980)	25
STATUTES AND REGULATIONS:	
Longshoremen's and Harbor Workers' Compensation Act 1976):	1, 9
20 C.F.R. § 703.001-703.121 (1980):	21
33 U.S.C. § 902	11, 18

Table of Authorities Continued

	Page
33 U.S.C. § 904	<i>passim</i>
33 U.S.C. § 905	<i>passim</i>
33 U.S.C. § 907	11, 15, 31
33 U.S.C. § 908	11, 15, 31
33 U.S.C. § 909	15, 31
33 U.S.C. § 918	21
33 U.S.C. § 932	17, 20, 21, 23
33 U.S.C. § 933	<i>passim</i>
33 U.S.C. § 937	17
33 U.S.C. § 938	11, 13
33 U.S.C. § 941	23
33 U.S.C. § 944	21
Workmen's Compensation Law of the District of Columbia, Pub. L. No. 419, 45 Stat. 600 (1928)	10
District of Columbia Workmen's Compensation Act, D.C. Code § 36-501 <i>et seq.</i> (1973)	1
District of Columbia Workers' Compensation Act of 1979, D.C. Code Ann. § 36-301 <i>et seq.</i> (1981)	30, 37
D.C. Code Ann. § 1-2431 (1981)	25
New York Workmen's Compensation Act: 1922 N.Y. Laws, Ch. 615	9
Washington Metropolitan Area Transit Authority Interstate Compact, Pub. L. No. 89-774, 80 Stat. 1324 (1966)	7, 37, 41, 42, 43, 44
CONGRESSIONAL MATERIAL:	
S. 525, 92d Cong., 1st Sess. (1971)	18
H.R. Rep. No. 92-1441, 92d Cong., 2d Sess. (1972)	14, 22, 23, 32, 34
H.R. Rep. No. 1422, 70th Cong., 1st Sess. (1928)	9
H.R. Rep. No. 1190, 69th Cong., 1st Sess. (1926)	9
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Table of Authorities Continued

	Page
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Table of Authorities Continued

	Page
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Washington Evening Star, June 16, 1981	23
Webster's New Collegiate Dictionary (1981)	24, 25
Webster's New World Dictionary (2d College Ed. 1979)	24

ADDITIONAL RELEVANT STATUTES

In addition to the Statutes listed by petitioner, the following provision is relevant:

Section 933 of said Act (33 U.S.C. § 933 (1976)) provides in pertinent part:

(a) If on account of a disability or death for which compensation is payable under this Act the person entitled to such compensation determines that some person other than the employer or a person or persons in his employ is liable in damages, he need not elect whether to receive such compensation or to recover damages against such third person.

COUNTERSTATEMENT

These consolidated cases pose two related questions for the Court's resolution: Whether the Washington Metropolitan Area Transit Authority ("WMATA" or "the Authority") is a third person subject to liability in tort under Section 933(a) of the Longshoremen's and Harbor Workers' Compensation Act ("LHWCA" or the "the Act"), 33 U.S.C. § 901 *et. seq.* and its District of Columbia extension, D.C. Code §§ 36-501 *et. seq.* (1973) ("DCWCA") and whether it is immune from such suits by virtue of the operation of Sections 904(a) and 905(a) of the Act. The factual setting for WMATA's claim to statutory immunity, and the lower courts analyses of these claims, are described below.

WMATA'S Coordinated Insurance Program

Under all construction contracts awarded by the Authority prior to July 30, 1971 (Phase I), each contractor-employer and subcontractor-employer secured workmen's compensation insurance for its own employees (J.A. 261). On July 31, 1971, WMATA unilaterally initiated its Coordinated Insurance Program ("CIP") (J.A. 261), which was "a method of guaranteeing that all contractors and subcontractors of whatever tier and the Washington Metropolitan Area Transit Authority are covered for Statutory Workmen's Compensation-Employer's Liability Insurance (D.C. benefits), Comprehensive General Liability, including Products Insurance and All Risk Builders Risk Insurance." (J.A. 104). Under this plan, commonly referred to as "wrap-up" insurance (Pet. Br. at 39, n. 56), WMATA paid the premium costs for the insurance coverage provided, and contractors were expected to

recognize this fact when submitting their bids (J.A. 104). The CIP applied to all construction contracts awarded by WMATA after July 30, 1971 and to all subcontracts thereunder. (J.A. 261). WMATA's own employees are not covered under the CIP for workmen's compensation, because the Authority is a qualified self-insured employer under Section 932 of the Act.

The insurances provided under the CIP apply only to the activities of WMATA's contractors and these contractors' sub-contractors at WMATA construction sites, and "does not apply to the operations of any contractor in his regularly established main or branch office, factory, warehouse, or similar place nor to any employees of such operations." (J.A. 108). The Authority reserves the right to change the terms and conditions of its CIP, and in the event of cancellation by the insurance carrier, to require the contractors to secure alternative insurance, in which event WMATA agrees to reimburse its contractors for the cost of procuring the alternative insurance (J.A. 108-109).

The CIP approach offers tremendous cost savings to an owner. This is the primary reason for its use.¹ The Authority receives the benefit of any premium rebates which may be returned by the insurer. Under wrap-up, contractors and subcontractors do not share in the monetary benefit of safe work or the monetary penalty for unsafe work (J.A. 76).² Although WMATA paid the premium costs, the insurance was procured for the benefit of the contractors and their subcontractors (J.A. 106), and Certificates of Insurance evidencing the coverages

¹ Barrett, *Insurance for Urban Transportation Construction*, Report No. UMTA-MA-0025-77-13, at 1-8 (Dept. of Transp. 1977).

² In June, 1978, the Petitioner herein introduced the WMATA Construction Safety Incentive Award Program. *Walker v. Bechtel Assoc. Prof. Corp., D.C.*, Deposition of Donald Lahr, August 28, 1981 at 31. The initiation of this incentive program, included at J.A. 159-161, followed recommendations of the A. A. Mathews study (J.A. 68) and the Barrett report (note 1, supra, at 4-6) to create monetary incentives to contractors for good safety performance. Though included in the Joint Appendix, the Safety Award Program was not a part of the record below in the *Johnson* case, nor was it a part of the record in any of these consolidated cases. Presumably the exhibit was reproduced from a more recent edition of WMATA's Coordinated Safety Program and Reporting Procedures. In any event, the Safety Award Program was not applicable to any of the construction sites involved in this case. It applied only to contracts awarded after June, 1978.

provided by CIP were issued to the contractors and subcontractors covered by the policies (J.A. 106-108, 110-113, 225). All workers' compensation claims since the CIP was initiated have been paid in the name of and on behalf of the named insured contractor-employer (*see*, e.g., J.A. 47).

The District Courts' Decisions

The first of the District Court decisions was the memorandum opinion of Judge June Green filed on July 30, 1982.³ Judge Green's decision was founded on the conclusion that under the CIP, WMATA, and not Mr. Eighmey's employer, "secured" the compensation insurance (Pet. App. 2a). Because WMATA "secured" the insurance, the court reasoned, it was entitled to the *quid pro quo* immunity of an employer under Section 905(a) (Pet. App. 2a). The decisions of District Court judges Howard Corcoran (Pet. App. 6a-12a) and Charles Richey (Pet. App. 13a-18a) employed similar reasoning but followed this legal conclusion to its logical result: that the injured employees' employers had "failed" to secure workers' compensation under the CIP, and that the employee could therefore sue his employer in tort (Pet. App. 11a, note 2; Pet. App. 17a-18a). In effect, the district judges held that either the contractor or the subcontractor may secure workers' compensation benefits for the subcontractor's employees (See Pet. App. 15a-16a). In the event that the contractor exercises its option to "secure" the compensation insurance before the subcontractor does, it becomes immunized from suit by the subcontractor's employee under Section 905(a) while the subcontractor becomes a "third person" subject to suit under Section 933(a) or a noncomplying employee under Section 905(a) (Pet. App. 11a, n.2, 17a-18a).

The District Courts apparently saw no significance in the fact that the named insureds under the CIP were the employer-contractors and employer-subcontractors. Nor did the courts believe that it was signif-

³ Petitioner incorrectly states (Pet. Br. at 11, n. 16) that it filed the affidavit of its Secretary in support of its Motion for Summary Judgment in the *Eighmey* case. In fact, Judge Green ordered, *sua sponte*, a hearing on the issue of WMATA's statutory immunity on June 21, 1982 (J.A. 12, NR. 35). Oral hearings were held pursuant to the Court's *sua sponte* order on July 15 and 26, 1982 (Pet. App. 1a). WMATA filed neither a formal motion for summary judgment nor any documentary exhibits or affidavits in the *Eighmey* case.

icant that compensation benefits were paid on behalf of the immediate employers or respondents, against whom, in every case, the workers' compensation claims were filed. The District Court decisions also rejected respondents' arguments that the contract documents themselves disproved the contention that a contractor-subcontractor relationship existed between the Authority and its prime contractors. (See e.g. Pet. App. 28a).

The Court Of Appeals' Decision

The Court of Appeals reversed the District Court decisions. The court concluded that the statutory purpose of Sections 904 and 905(a) was to impose only a "secondary, guarantee-like liability" on a general contractors (Pet. App. 53a). The subcontractor-employer is primarily liable and hence is required to "secure" compensation for his employees (Pet. App. 53a). The court held that only where the subcontractor fails to secure compensation for his employees pursuant to his primary statutory obligation does the general contractor have a legal obligation to provide workers' compensation to the subcontractor's employee (Pet. App. 52a). The court relied on the rationale of *Probst v. Southern Stevedoring Co.*, 379 F.2d 763, (5th Cir. 1967) and *Thomas v. George Hyman Construction Co.*, 173 F. Supp. 381 (D.D.C 1959), stating that "courts have allowed a general contractor to invoke the statutory immunity *only* when he was *legally required to*, and did in fact, provide workmen's compensation insurance" (Pet. App. 52a).

The court concluded that WMATA's "subcontractors"⁴ had the primary obligation to "secure" workers' compensation benefits for their employees under Section 904(a) (Pet. App. 55a). WMATA's voluntary introduction of the CIP supplanted the subcontractor's primary obligation to secure compensation, and thus "pre-empted the proper functioning of the [statutory] scheme." (Pet. App. 55a). The court did not reach the question of whether the subcontractor-employers had satisfied their obligation under Section 904(a) to "secure" compensation by participating in the CIP. (Pet. App. 56a, n.16)

⁴ The Court of Appeals did not discuss the issue of whether WMATA is in a contractor-subcontractor relationship with appellant's employers. It apparently assumed for purposes of its decision the existence of a contractor-subcontractor relationship.

The court concluded that "WMATA is amenable to suit as a potentially liable third-party tortfeasor," notwithstanding its purchase of the worker's compensation insurance coverage contained in the CIP (Pet. App. 56a-57a).⁵

SUMMARY OF ARGUMENT

Section 905 of the LHWCA is simple and straightforward. It extends immunity from common law suits for negligence to employers in return for satisfaction of their duty to provide workers' compensation benefits to their employees regardless of fault. Under no circumstances does Section 905 extend immunity to contractors, to owners, or to any other voluntary provider of workers' compensation benefits. The legislative history of the LHWCA strongly confirms that Congress meant what it said when it enacted the Act in 1927. The Act has remained unaltered, despite decisions under the New York Law, upon which it was based, and decisions under the LHWCA confirming that only the immediate employer is entitled to immunity.

Section 933 of the LHWCA is also simple and straightforward. It guarantees the injured employee's common law right to pursue a claim for negligence against any "third person." Section 933 of the Act extends immunity from suit to fellow employees of injured workers, but does not mention contractors, owners or other voluntary providers of workers' compensation benefits. The legislative history of Sec-

⁵ When these lawsuits were commenced, it was presumed that the injured employees' immediate employers were immune from suit under Section 905(a), because compensation benefits had been paid under the CIP on behalf of and in the name of the immediate employers. WMATA implies that respondents should have known that their employers, rather than WMATA, were subject to suit (Pet. Br. at 24-25). Petitioner's assertion that counsel for respondents "knew of the wrap-up insurance program and its consequences long before they filed the complaints against Bechtel" (Pet. Br. at 24-25) is simply an unfounded falsehood. None of respondents' counsel knew any more about WMATA's CIP prior to instituting the actions against Bechtel than the fact that one carrier, Lumberman's Mutual Casualty Company, insured all contractors and subcontractors for workers' compensation and liability, and that one adjusting company, National Loss Control Service Corporation, adjusted all the workers' compensation and liability claims. The details of the CIP were revealed during discovery proceedings against Bechtel in 1981. Counsel for respondents certainly had no reason to suspect that the CIP would turn an employer into a third party and a third party into an employer.

tion 933 and subsequent amendments to the Act provide a further strong indication that Congress did not intend to limit the definition of "third person" or to limit an injured workers' common law rights any more than the language of the Act plainly states.

In the face of the plain language of Sections 905(a) and 933(a) of the Act, petitioner argues that Section 904(a) of the Act extends immunity to contractors who purchase workers compensation insurance on behalf of subcontractors. Respondent submits that petitioner has offered no evidence of legislative intent and no relevant policy considerations which justify ignoring the language of the statute. Section 904(a) of the LHWCA does not extend immunity from suit to contractors in return for satisfying their secondary contingent obligation under that section. Section 904(a) of the Act is simply not an immunity provision. Moreover, WMATA's purchase of insurance for the contractors on the Metro system was not a response to a default by any contractor, and was intended to satisfy the statutory obligations of the contractors, not any statutory obligation that WMATA may have had. Therefore, if anyone is entitled to immunity, it is those contractors. Furthermore, even if Section 904(a) did confer immunity from suit to contractors, WMATA is not a contractor within the commonly understood meaning of the term. Extending immunity to an owner of a construction project who is not in the construction business does not serve the policies which the authorities that recognize broad statutory immunity rely on in support of such immunity.

Respondent's arguments that the Court of Appeals' decision will paralyze the purpose of the LHWCA to ensure employee compensation coverage, will undermine Congress' intent to ensure swift delivering of benefits, and will create a "litigation explosion" are unsupported. Logic and a rational understanding of the court's decision, the operation of the LHWCA and the insurance business compel the conclusion that the court's decision will produce none of these results. Rather, the court's decision will promote the purpose of the LHWCA to ensure coverage and payment of benefits, while preserving every employee's common law rights and furthering on the job safety. Similarly, the Court of Appeals' decision will produce none of the anomalous results outlined by petitioner and by *amici curiae* and, in any event, none of these claimed anomalies are relevant to the purposes of the Act or sufficient to overcome the plain language employed by Congress.

Finally, if this Court concludes that WMATA is entitled to immunity from suit, the immunity conferred should bar only traditional tort suits based on the negligence of WMATA employees. It would be an anomalous result, indeed, if WMATA also received immunity for the torts of Bechtel, for which it is solely responsible under Section 80 of the WMATA Compact, leaving respondents with no remedy for Bechtel's tortious conduct.

ARGUMENT

I. Only The Immediate Employer And Persons In His Employ Are Entitled To Immunity From Suit By The Employer's Injured Employee Under Sections 905 And 933 Of The Longshoremen's And Harbor Workers' Compensation Act.

A. The plain language of Sections 905(a), 933(a) and 933(i) of the LHWCA extends immunity from suit only to employers who secure payment of compensation to their employees, and to officers and employees of such employers.

As Petitioner notes, this Court has often stated that the courts should respect the plain language of the LHWCA whenever possible, adhering "closely to what Congress has written." *Rodriguez v. Compass Shipping Co.*, 451 U.S. 596, 602-603, 616-617 (1981); *Morrison-Knudsen Construction Co. v. Director, OWCP*, 103 S.Ct. 2045, 2049 (1983); *Potomac Electric Power Co. v. Director, OWCP*, 449 U.S. 268, 273-274 (1980) ("Pepco"); *Director, OWCP v. Rasmussen*, 440 U.S. 29, 47 (1979). Furthermore, Section 905(a), like any provision which limits common law rights, "must be strictly construed, for '[n]o statute is to be construed as altering the common law, further than its words import. It is not to be construed as making any innovation upon the common law which it does not fairly express'." *Herd & Co. v. Krawill Machinery Corp.*, 359 U.S. 297, 304-305 (1959) (quoting *Shaw v. North Pennsylvania R.Co.*, 101 U.S. 557, 565 (1879)).

The plain language of Section 905(a) extends immunity from suit only to an employer, and only when that employer satisfies his statutory obligation to secure payment of compensation to his employees, as prescribed by Section 904(a). There is no dispute, of course, that WMATA is not the employer of any of the respondents in this case. Nowhere in the LHWCA has Congress stated or implied that, while it chose to expressly extend immunity only to employers, it in fact

intended to extend immunity to contractors who purchase compensation coverage for employees of subcontractors. Had it intended to extend immunity to contractors, Congress could easily have drafted the first Section 905(a) to read: "the liability of an employer or contractor as prescribed in Section 4 shall be exclusive and in place of all other liability of such employer or contractor. . . ." Given that Section 905(a), by its clear and unequivocal terms, extends immunity only to employers, and that WMATA is not the employer of respondents, WMATA must show a clear expression by Congress that it did not intend to extend immunity from suit only to employers. *Rodriguez*, 451 U.S. at 604. Congress neither demonstrated such an intent when it enacted the LHWCA in 1927, nor elected to do so when amending relevant portions of the Act in 1938, 1959 and 1972. As discussed in detail in Part I(B), below, a review of the legislative history reveals that Congress has never intimated at a purpose at odds with the plain language of Section 905(a).

Congress also addresses the respective rights of employers, employees and third parties in Section 933 of the Act. As in Section 905(a), Congress clearly and unequivocally stated its purpose. The clear wording of Section 933(a) permits an injured employee to pursue his common law right to damages against anyone "other than the employer or a person or persons in his employ."⁶ Similarly, Section 933(i) provides that compensation is the exclusive remedy when an injury is caused by the negligence or wrong of a fellow employee, and that the provision does not affect the liability of anyone other than an officer or employee of the employer. Nowhere in Section 933 does Congress evince an intent to limit the definition of third person, or to extend immunity beyond the employer-employee family.

In summary, since there is nothing ambiguous about the language chosen by Congress, WMATA's invitation to ignore the plain language of the LHWCA and to "rewrite Congress' words" should be declined and the language chosen by Congress should be "regarded as conclusive." *Rasmussen*, 440 U.S. at 47; *Consumer Product Safety Comm'n. v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980).

⁶Section 933(a) was amended by Congress in 1959 to expressly provide that an injured employee need not elect between his statutory right to compensation and his common law damage action against a third person. *Rodriguez*, 451 U.S. at 611, n. 27; *Bloomer v. Liberty Mutual Insurance Co.*, 445 U.S. 74, 80 (1980).

B. The legislative history of the LHWCA and the provisions of and decisions under the New York Compensation Law, upon which the Act is based, confirm that Congress intended to extend immunity only to the injured worker's employer and fellow employees.

The LHWCA was enacted by Congress on March 4, 1927. The Act was based on the New York Workmen's Compensation Law as amended in 1922,⁷ which "was considered one of the best workmen's compensation laws of its time."⁸ A review of the provisions of the New York law which supplied the model for Sections 904 and 905 of the LHWCA, and an examination of the structure of that law lends additional support to an interpretation of Section 905(a) consistent with its unambiguous language.

The 1922 New York law consisted of seven articles. Article 2 sets forth, in Sections 10 and 11, the *quid pro quo* compromise incorporated by Congress in Sections 904 and 905(a) of the Act.⁹ The New York legislature left no doubt that only employers and employees are involved in this compromise. Nowhere in Sections 10 or 11, or in any other part of Article 2, are contractors mentioned.

One of the new provisions enacted by the New York legislature in 1922 was Section 56, whose clear purpose was to ensure the immediate employer's compliance with his Section 10 responsibility to secure compensation to his employees.¹⁰ This provision, which was located in Article 4 of the New York law under the heading "Security for Compensation," makes no reference either to immunity or to Section 11, supplying further persuasive evidence that the New York legislature

⁷ 1922 N.Y. Laws, Ch. 615.

⁸ *Potomac Electric Power Co. v. Director, OWCP*, 449 U.S. 268, 275-276 (1980). See H.R. Rep. No. 1190, 69th Cong., 1st Sess., 2 (1926); See also H.R. Rep. No. 1422, 70th Cong., 1st Sess., 1-2 (1928).

⁹ 1922 N.Y. Laws, Ch. 615 §§ 10 and 11.

¹⁰ 1922 N.Y. Laws, Ch. 615, § 56.

Section 56 provided, in pertinent part:

A contractor . . . who subcontracts all or any part of such contract shall be liable for and shall pay compensation to any employee injured whose injury arises out of and in the course of such . . . employment, unless the subcontractor primarily liable therefor has secured compensation for such employee so injured as provided in this chapter.

did not intend to confer immunity in return for the contractor's secondary compensation liability.

The LHWCA, as enacted in 1927, substantially adopted these statutory provisions. The first sentence of Section 904(a) and the entirety of Section 904(b) of the Act, like Section 10 of the New York law, place a mandatory and primary statutory obligation on each employer to provide his employees with compensation, regardless of fault. Section 905(a), employing language virtually identical to Section 11 of the New York law, confers immunity in return for satisfaction of the obligations prescribed by the first sentence of Section 904(a). The second sentence of Section 904(a) adopts, in very similar but abbreviated language, the secondary obligation imposed on contractors by Section 56 of the 1922 New York law. Thus, while Congress rearranged and consolidated certain provisions of the New York law, it left those provisions virtually intact. If Congress intended to enact a statutory provision providing for immunity substantially broader in scope than that of the New York law, it employed language very poorly designed to do so.

The legislative history of the Act also indicates that Congress did not intend to enact an immunity provision more expansive in scope than that of New York. Although Congress did not specifically discuss Section 905(a) or the scope of immunity, it is significant that Congress nowhere indicated that it did not intend the section to have the same meaning as the virtually identical provision of the New York law. *Pepco*, 449 U.S. at 275-76.

The legislative history of the DCWCA and subsequent amendments to the LHWCA, as well as the parallel interpretations of the New York and Federal Acts by the judiciary, further support an interpretation of Sections 905 and 933 consistent with their language. Prior to the passage by Congress of the DCWCA in 1928,¹¹ the New York Court of Appeals was presented, in *Clark v. Monarch Engineering Co.*, 248 N.Y. 107, 161 N.E. 436 (1928), with the question of whether the secondary liability imposed on contractors by Section 56 of the New York statute destroyed any common law rights of action which existed prior to the enactment of Section 56. The court did not address the

¹¹ Public Law No. 419, 70th Congress, Passed May 17, 1928.

broad question of whether a contractor obtains an employer's immunity when it is legally required to pay compensation benefits to an employee of a subcontractor who has failed to satisfy his statutory obligation. The court did, however, decide that at least where the secondary, contingent liability of a contractor has not arisen, the immunity provided by Section 11 does not extend to contractors. *Clark*, 248 N.Y. at 108.

Against the backdrop of both the New York law and the New York Court of Appeals' unanimous decision, Congress thereafter passed the DCWCA.¹²

In 1938, Congress passed the first of a series of amendments to Section 933 of the Act. Concerned that the assignment of all third-party rights to the employer upon mere acceptance of compensation might force workers to make a hasty and improvident election, Congress decided that assignment should not occur until the employee accepts compensation under an award in a compensation order. The 1938 amendment and the legislative history of that amendment plainly demonstrate Congress' continuing intent to allow workers to pursue their common law remedies against third parties should they so desire. In addition, the legislative history makes clear that the amendment was based on a similar provision in the New York law, indicating that Congress continued to hold the New York law in high regard, and reinforcing the similarity of purpose of the two Acts.¹³

Congress passed more extensive amendments to Section 933 in 1959. The most significant of the 1959 amendments changed Section 933(a) to allow an employee to pursue a third-party liability suit without forfeiting his right to compensation. Congress also amended Section 933(b) to postpone the assignment of any third-party action

¹² As this Court has stated, "(w)e may presume 'that our elected representatives, like other citizens, know the law.'" *Director, OWCP v. Perini North River Assoc.*, 103 S.Ct. 634, 649 (1983), (quoting *Cannon v. University of Chicago*, 441 U.S. 677, 696-697 (1979)).

¹³ See, S. Rep. No. 1983, 75th Cong., 3d Sess. 9 (1938). In fact, a review of the entire Senate Report reveals that amendments to Sections 902, 907, 908 and 938 in the same enactment were also based on similar provisions in the New York law.

until six months after acceptance of compensation under an award.¹⁴ Again, Congress manifested a desire to expand the ability of employees to pursue third party remedies and, again, the amendments paralleled similar developments in the New York law.¹⁵

Perhaps the most important 1959 amendment, for purposes of this case, was the addition of Section 933(i) of the Act, which provides immunity from common law suit to officers and employees of the employer. The Senate Report indicates that Section 933(i) was added to protect the worker from the risk of a large common law liability should he negligently injure a fellow employee. S. Rep. No. 428, 86th Cong., 1st Sess. 2 (1959). Having considered the scope of immunity provided by the Act, Congress determined that fellow employees needed further protection. Congress apparently did not conclude that contractors required similar protection. Congress' failure to demonstrate an interest in extending immunity to contractors is particularly significant because the New York Court of Appeals had determined in 1946 that the New York Workmen's Compensation Law did not extend immunity to a contractor, even where the contractor was obligated to pay compensation to the plaintiff as the employee of an uninsured subcontractor. *Sweezy v. Arc Electrical Construction Co.*, 295 N.Y. 306, 67 N.E. 2d 369 (N.Y. 1946).¹⁶

The court in *Sweezy* reasoned that since the general contractor was clearly a third party within the meaning of Section 29 (the equivalent of Section 933 of the LHWCA), since it was difficult to find in Section 56 (the equivalent of the second sentence of Section 904(a) of the Act) any expression of legislative intent to destroy the employee's common law negligence action, and since the contractor was clearly not an employer within the meaning of Section 11 (the equivalent of Section 905(a) of

¹⁴ For a detailed review of the 1959 amendments, as well as the problems which led to the amendments, see this Court's decision in *Rodriguez*, 451 U.S. at 609-612.

¹⁵ The 1959 amendments to section 933 follow substantially similar to amendments to the New York Worker's Compensation Law. See, *Bloomer*, at 81, n.5; See also, S. Rep. No. 428, 86th Cong., 1st Sess. 3 (1959).

¹⁶ The decision of the District Court in *Thomas v. George Hyman Constr. Co.*, 173 F.Supp. 381 (D.D.C. 1959), denying immunity in return for the voluntary purchase of insurance by a general contractor for the benefits of employees of subcontractors, was also rendered prior to the 1959 amendments.

the Act), there was no reason to read into Section 56 an intent to make the liability imposed by that section exclusive. *Sweezy*, 295 N.Y. at 306-308.¹⁷

The court also stressed that there is no employer-employee relationship between the contractor and the employee of a subcontractor, and that no fictional relationship need be created to justify the secondary liability imposed on contractors. The liability of the contractor is, rather, based on its relationship to the subcontractor, and is that of a guarantor. *Id.* at 308.

The New York court's analysis reveals the true significance of the fact, addressed by WMATA (Pet. Br., pp. 30-34), that Congress referred only to the employer, and not the contractor, in numerous sections of the Act relating to compensation liability. Congress undoubtedly had every expectation, as evidenced by the criminal penalties provided by Section 938(a) of the Act, that employers would obey the law, and that the contractor's secondary liability would therefore be rarely invoked. That the scheme has been successful is reflected by the fact that questions concerning the contractors liability or immunity have rarely arisen under the LHWCA, and by the fact that Congress has not deemed it necessary to amend the Act to extend immunity to contractors.

The New York court's reasoning also exposes the fallacy of petitioner's (and Professor Larson's) "economic fairness" arguments. WMATA has, in effect, recovered its lien and received a *quid pro quo* by virtue of its instruction to contractors to recognize that WMATA has purchased compensation insurance for them when submitting their bids. (J.A. 104).¹⁸

¹⁷ Petitioner grossly misstates the holding of the *Sweezy* Court, claiming that the basis of the court's holding was that the contractor's secondary duty was merely to *pay* rather than to *secure* compensation (Pet. Br. at 23, n. 31). As stated above, the New York court's holding was based on its interpretation of Sections 10, 11, 29 and 56 of the New York statute. If the fact that Congress used the word "secure" rather than "pay" has any significance, it is only that it suggests that Congress, for the further protection of employees, wanted contractors to purchase insurance to secure their secondary liability. Assuming that this is so, it does not at all affect the applicability here of the New York court's reasoning.

¹⁸ Petitioner also implies that WMATA is somehow being held legally liable for both compensation payments and for its torts. This argument fails because it assumes that

The legislative history of the 1972 amendments to the LHWCA also supports a literal reading of Section 905(a). For the first time, Congress was extended an invitation to expand immunity beyond the employer-employee relationship. Congress declined that invitation. The House Report accompanying the version of the bill enacted by Congress states that "[t]he Committee rejected the proposal, originally advanced by the industry, that vessels should be treated as joint employers of longshoremen or other persons covered under this Act working on board such vessels." H.R. Rep. No. 92-1441, 92d Cong., 2d Sess. 4 (1972).¹⁹

Congress also reiterated the salutary effect of third-party actions, stating that "permitting actions against the vessel based on negligence will meet the objective of encouraging safety because the vessel will still be required to exercise the same care as a land-based person providing a safe place to work." *Id.* at 6.

Since Congress spent considerable time and effort discussing third party actions, and specifically rejected an opportunity to create statutory employer immunity for shipowners, it is reasonable to presume that Congress was aware of and approved of the growing body of

the compensation insurance provided here covered WMATA's liability. To the contrary, the coverage was intended to satisfy the employers' obligations (J.A. 47-68, 104, 106-108, 225). WMATA merely voluntarily paid the premium (See further discussion in Part II(B)(1) of our argument). WMATA also implies that the Court of Appeals' decision will place an unexpected economic burden on Lumbermans Mutual Casualty Company and on the public, to whom the cost of insurance coverage is ultimately passed. This argument is puzzling. According to the logic of WMATA's legal argument, the employers covered under the CIP have failed to satisfy their statutory duty to secure compensation, and are subject to suit by their employees. If this is the case, then the alternative proposed by WMATA would merely cause the roles of WMATA and the contractors with respect to compensation and tort liability to be reversed, resulting in systemwide tort liability at least equal in scope.

¹⁹ This Court concluded in *Jones and Laughlin Steel Corp. v. Pfeifer*, 103 S. Ct. 2541 (1983), that a longshoreman may, under certain circumstances, sue the owner of a vessel, even if the longshoreman is employed by the owner. It cannot have been Congress' intention that a longshoreman may sometimes sue his employer, despite the language of Section 905(a), but an employee of a subcontractor may not sue the contractor, despite the fact that the contractor clearly qualifies as a third-person within the meaning of Section 933(a), and is not an employer within the meaning of Section 905(a). One must assume that Congress intended a relatively consistent scheme of liability in the longshore industry.

caselaw under the Act denying general contractors immunity under Section 905(a). *See, e.g., Probst v. Southern Stevedoring Co.*, 379 F.2d 763 (5th Cir. 1967).²⁰

In summary, the legislative history of the Act and its amendments, as well as the New York statute and the decisions of the New York courts thereunder, clearly support an interpretation of Sections 905(a) and 933 consistent with their plain language.

II. Neither Contractors, Who Have A Secondary Contingent Obligation To Secure Payment Of Workers' Compensation Benefits To Employees Of Subcontractors, Nor Owner-Contractees, Such As WMATA, Who Have Neither A Primary Nor A Secondary Duty To Secure The Payment Of Workers' Compensation Benefits For Employees Of Subcontractors, Are Entitled To Immunity From Suit By Employees Of Subcontractors.

A. The Court of Appeals correctly decided that contractors have merely a secondary, contingent obligation to secure the payment of compensation under Section 904 (a) to employees of subcontractors.

1. The plain language of the Act requires every employer, including subcontractors, to secure the payment of compensation to its employees.

The first sentence of Section 904(a) plainly states that "every employer shall be liable for and shall secure the payment to his employees of the compensation payable under sections 907, 908 and 909 of this title." This statutory language is simple, direct, and mandatory, and places a primary obligation on every employer, including subcontractor-employers. Sections 907, 908 and 909 of the Act enumerate the employer's duties: Section 907 sets forth the employer's obligation to provide medical services; Section 908 sets forth the employer's obligations for various categories of disability; and Section 909 sets forth the employer's compensation obligations when the employee's injury results in death.

²⁰ The issue appeared, at the time, to be well settled, and an entire body of local case law governing negligence actions in this context was developing. *See, eg., Bowman v. Redding & Co.*, 449 F.2d 956 (D.C. Cir. 1971) (evidentiary standards where general contractor has violated OSHA regulations).

Petitioner argued in its Petition for a Writ of Certiorari that the second sentence of Section 904(a) "plainly supplants any duty that subcontractors would have as 'employers' under the first sentence of Section 904(a)" and that "(a) contractor has a continuing duty to obtain compensation insurance and a subcontractor, by contrast, has no duty *at all* to obtain such insurance" (Pet. for Cert. at 12). This reading of the second sentence of Section 904(a) is deficient on its face for three reasons. First, if Congress had intended to make the contractor responsible for securing workers' compensation for its subcontractor's employees, it would have omitted the phrase "unless the subcontractor has secured such payment" from the second sentence of Section 904(a). Second, Congress would have qualified the clear and mandatory duty of every employer to secure compensation pursuant to Section 904(a)'s first sentence so that subcontractors would be exempted from this duty. Finally, if Congress had intended the contractor to have the only obligation to secure compensation, then surely it would have explicitly awarded the contractor immunity in Section 905(a). For these reasons WMATA clearly has neither the only duty nor the primary duty to secure compensation under Section 904(a).

WMATA does not, however, repeat this argument in its brief. Instead, petitioner merely restates the language of the statute, without taking a firm position as to whether the obligations of the contractor are primary or secondary. WMATA seems to imply one of two alternative explanations for its immunity claim: that the contractor has the option to secure insurance for his subcontractors, and may supplant the employer's duty and immunity *at any time*, or that his secondary obligation confers immunity, as long as he purchases the coverage *prior* to the subcontractor. A contractor unquestionably does not have the power to obtain immunity by voluntarily securing compensation at any time he chooses. Such action would clearly not be based on any duty imposed by Section 904(a), and would prevent the subcontractor-employer from fulfilling his mandatory statutory obligation under the first sentence of Section 904(a). The second alternative would similarly leave the employer-subcontractor in default of his obligation as an employer. This interpretation of Section 904(a) creates a race between the contractor and subcontractor to "secure" workers' compensation for the subcontractor's employees under Section 904(a). If the contractor wins the race, he also wins statutory immunity from suit. If the subcontractor loses the race, which he will

always lose under a unilaterally prescribed program such as the CIP, he finds himself in default of his statutory obligation to secure compensation.

The language of Section 937, which was enacted with Section 904(a) in 1927, also lends support to the conclusion that Congress intended every employer to secure compensation for his own employees. Section 937 requires the vessel owner to make sure, prior to hiring the stevedore, that the stevedore has properly complied with Sections 904(a) and 932 of the Act, and to obtain proof of that compliance. Section 937 does not give the vessel owner the primary duty to secure the compensation benefits for the stevedore's employees. To the contrary, stevedoring firms have the primary duty, like all other employers, to secure the payment of compensation for their employees pursuant to Section 904(a). Section 937, like Section 904(a), was designed specifically to ensure compliance with the provisions of the Act by the immediate employer by placing a burden on the party for whom services are to be performed to demand proof of statutory compliance by the party he employs. The contractor and vessel owner are liable only when they fail to satisfy this burden, and may be described as statutory "guarantors" of payment of compensation under the Act to employees of the parties they hire.

Congress clearly cannot have intended that the relative economic strength of the contractor and subcontractor would determine who secures compensation and who obtains immunity. Congress must have meant what the language of Section 904(a) plainly states, and what the language of every section of the Act relating to the payment of compensation obviously presumes: that the employer has a primary, mandatory duty to secure compensation.

2. **The legislative history of the Act supports the conclusion that Section 904(a) places only a secondary, guarantee-like liability on a contractor to employees of its subcontractors.**

The legislative history of the LHWCA, and of subsequent amendments thereto, supports the conclusion that a contractor's liability under Section 904(a) is contingent, and that the subcontractor-employer has the primary statutory obligation to secure compensation for his own employees. As discussed in Part I of this argument, it is beyond dispute that the LHWCA was based on the New York Com-

pensation Law of 1922. It is equally clear, moreover, that the second sentence of Section 904(a) was drawn from Section 56 of the New York law, which states in even plainer terms that the duty of the employer is primary and that the contractor's duty is secondary and protective in nature. While Congress did not discuss the relevant language of Section 904(a) in great detail, the Senate Judiciary Committee did state that the section contains "the appropriate provisions for making certain that compensation will be paid." S.Rep. No. 973, 69th Cong., 1st Sess. 16 (1926). There is absolutely no indication in the legislative history that Congress intended to change the nature of the contractor's obligation to the employees of subcontractors from that expressed by the New York statute.

Congress' clear intent is further manifested by an attempt by Senator Prouty in 1971 to broaden the immunity provisions of the Act by amending Section 904(a) of the Act. S. 525, 92d Cong., 1st Sess. (1971). Senator Prouty's bill would have broadened the definition of "employer" in Section 902 of the Act to include vessels, would have placed a secondary liability on vessel owners to secure compensation for employees of other employers working on the vessel, and would have extended immunity to *all* employers working on the vessel whenever *any* employer secured the payment of compensation to the injured worker. See *Subcommittee on Labor of the Senate Committee on Labor and Public Welfare*, 92nd Cong., 2d. Sess. (Committee Print 1972). The bill was poorly drafted, and its precise scope is unclear, but its introduction by Senator Prouty is significant because the bill provides an example of the type of statutory language necessary to evidence an intent by Congress to immunize a party other than the employer from suit. The fact that such language was proposed and rejected is further evidence that Congress intended that only an employer who has complied with his primary obligations under Section 904(a) is entitled to the immunity prescribed in 905(a).

Finally, the fact that Congress has never acted, despite the fact that the courts have unanimously held that the contractor's duty is secondary in nature, and that this contingent liability for compensation does not confer immunity, is further evidence that the Court of Appeals' conclusion that WMATA's duty is secondary and contingent is manifestly correct.

- B. The Court of Appeals correctly concluded that WMATA's secondary duty to purchase workers' compensation coverage was not invoked under the facts of these cases, and that the voluntary purchase of such coverage does not confer immunity from suit.**
- 1. Because the coordinated insurance program was designed not to satisfy any obligation on the part of WMATA, but rather the obligations of Metro contractors, only the contractors may attempt to claim immunity thereunder.**

Petitioner argues that it is entitled to statutory immunity because it had an obligation as a "contractor" to purchase compensation coverage for the employees of "subcontractors," and because it satisfied that duty. WMATA's argument is logically premised on the important assumption that the CIP was designed primarily to satisfy WMATA's statutory obligations, rather than those of the construction contractors and subcontractors. The issue of whose obligation the CIP was intended to satisfy forms the core of petitioner's assertion that contractors who satisfy *their* Section 904(a) duty are entitled to immunity as a reward or *quid pro quo* for the satisfaction of that obligation. Surely, WMATA cannot argue that it, or anyone else, would be entitled to immunity in return for satisfying another party's obligation.

Yet, this is precisely what the CIP was designed to accomplish.²¹ This fact is most clearly demonstrated by the specifications for the CIP issued by the Authority and Metro Insurance Administrators (J.A. 102-111). In the Introduction to the specifications, ~~WMATA~~ states that the insurance policies are being "made available to contractors and subcontractors" (J.A. 104). Under the "General Description of the Insurance Program," the Authority again states that it will procure and pay for insurance "for the benefit of contractors and others" (J.A. 106). In the same section, WMATA notes that "Certificates of Insurance . . . will be issued as required on behalf of those contractors

²¹ The factual setting here is the practical equivalent of a situation in which a general contractor, who has already separately contracted to protect *his* obligation, simply agrees with a subcontractor that it would make economic sense, because the general contractor has greater buying power, for the general contractor to purchase the coverage and for the parties to share the cost savings. As petitioner's note, the CIP apparently effected such a cost savings (Pet. Br. at 41, n. 60).

and subcontractors covered by the policies." (J.A. 107-108, 110-111, 225).

The insurance policies issued by Lumberman's Mutual Casualty Company (LMC) further confirm that the CIP was designed and intended to satisfy the statutory obligations of the contractor and subcontractors to their employees. The endorsements to the insurance policies reveal that the "Name of Insured" for purposes of the policies, was "any contractor" and "any subcontractor" on the construction jobsites (J.A. 128). In fact, WMATA is a qualified self-insured under Section 932 and has no need for any compensation insurance for its own employees.

The compensation claim forms filed on behalf of respondents, settlement petitions submitted for approval to the U.S. Department of Labor by LMC and respondents, and the compensation orders reflecting approval of those settlement petitions remove any doubt that all compensation claims have been made against respondents' direct employers, that claims have been paid by LMC on behalf of those employers, and that the agency charged with the administration of workers' compensation in the District has considered these claims to have been paid on behalf of the employers. (J.A. 50-51, 55-57, 66-67).²²

2. WMATA instituted the coordinated insurance program not because subcontractors failed to satisfy their statutory obligations, but for reasons of administrative efficiency and cost savings.

WMATA's argument rests in large part on the claim that it was legally obligated to purchase compensation insurance coverage for the employees of Metro contractors under the facts of this case. As discussed above, the secondary obligation of a contractor arises only upon a default by the immediate employer on his primary statutory obligation to provide coverage under Section 904(a). As we have shown, the

²² Commentators on wrap-up insurance programs also agree that such programs are designed to satisfy the primary statutory obligations of contractors and subcontractors, and that the legal relationships of the parties to the wrap-up agreement remain unchanged. Becker and Denenberg, *Wrap-Up of the Wrap-Up*, CPCU Annals 198-199, 203, 211. (Sept. 1967). See also, Barrett, *Insurance for Urban Transportation Construction*, Report No. UMTA-MA-06-0025-77-13 at 1-9 (Dept. of Transp. 1977).

CIP was and is intended to satisfy the obligations of the Metro contractors, not those of WMATA. The following discussion will show that, even assuming that the plan was intended to satisfy WMATA's duty, that duty has never arisen, because there is no evidence of subcontractor default. As the Court of Appeals recognized, the CIP was a voluntary plan which plainly pre-empted the employers' statutory duty.

WMATA claims in its brief that it initiated the CIP at least in part because "employees were at times left without coverage when individual policies lapsed—either because employers failed to make timely premium payments or because the insurance company involved went out of business." (J.A. 265, 285, 299) (Pet. Br. at 6). Petitioner's brief strongly implies that the record indicates that "gaps in coverage" were a major problem which had in fact occurred. Although WMATA's insurance director, upon whose testimony WMATA exclusively relies, expressed a concern that a "fly-by-night" insurance company might go out of business,²³ leaving the subcontractor's employees without protection,²⁴ there is no testimony or documentary evidence in the record to indicate that it had ever happened, and there is certainly no evidence that any of the employers involved in this case had ever defaulted on their obligations to their employees, or that they did not have insurance in effect at the time Phase II was instituted that would

²³ The LHWCA provides ample protection against "fly-by-night" insurance companies. First, any carrier purporting to write workers' compensation coverage must be authorized under Section 932 of the Act to do so by the Secretary of Labor. *See, also*, 20 C.F.R. §§ 703.001-703.121 (1980). Second, the employee may look directly to the employer under Section 918(a) if the carrier defaults. Third, the employee may recover benefits from the Section 944 Special Fund if a judgment against the employer cannot be satisfied. Finally, an employee of a subcontractor may, of course, look to the general contractor who, as noted above, is covered for such eventualities by a standard workers' compensation policy.

²⁴ WMATA relies to some extent on its concern that sub-subcontractors (contractors two levels away from WMATA who do not have a contractual relationship with WMATA) would have difficulty obtaining insurance (Pet. Br. at 6, 17-18). As Professor Larson notes, however, "if an employee of the lowest subcontractor on the totem pole is injured there is no practical reason for reaching up the hierarchy any further than the first insured contractor" 1C A. Larson, *The Law of Workmen's Compensation*, § 49.11 at 9-13 (1983). It is difficult for WMATA to claim, therefore, that it has a duty under Section 904(a) to the employees of any contractors with whom it is not in a contractual relationship.

have covered respondents, assuming normal policy renewal and absent the dictates of the CIP. Similarly, there is no evidence in the record to suggest that any of these contractors had ever been uninsured in their non-Metro employment, where the CIP does not apply.

Given the lack of record evidence sufficient to support a finding that a secondary legal duty had arisen, WMATA must rely either upon the legal conclusion of its insurance director that it had such an obligation, or the concerns expressed by its insurance director about the "possibility" that such gaps in coverage would occur. (J.A. 263, 265, 299). Respondents submit that neither incorrect conclusions about the legal necessity for the institution of the plan nor concerns about *future* gaps in coverage, even if accurate, make the institution of wrap-up insurance any less voluntary.

3. The voluntary purchase of workers' compensation insurance on behalf of another employer does not, and should not, confer immunity from suit.

The only construction of the LHWCA which would permit an extension of immunity to WMATA under the circumstances presented here (assuming that WMATA is a contractor) is a broad rule that all contractors are entitled to immunity under the Act simply based on the secondary duty prescribed by Section 904(a). Although WMATA does not attempt to argue for such a rule, it does not formally concede that it is not entitled to such immunity (Pet. Br. at 18, n. 23).

Assuming that such an argument were not precluded by the plain language of Sections 904(a) and 905(a), as well as the unanimous judicial authority interpreting the LHWCA, there are also profound policy reasons why such immunity should not be granted.²⁵ As the House Report accompanying the 1972 amendments stated:

It is important to note that adequate workmen's compensation benefits are not only essential to meeting the needs of the injured employee and his family, but, *by assuring that the employer bears*

²⁵ WMATA's CIP explicitly recognizes that it may conflict with provisions of the LHWCA, for it states that the "[t]erms of [the] policy which are in conflict with the provisions of the workmen's compensation law are hereby amended to conform to such law." (J.A. 124).

the cost of unsafe conditions, serves to strengthen the employer's incentive to provide the fullest measure of on-the-job safety.

HR Rep. No. 92-1441, 92nd Cong., 2d Sess. (1972) (emphasis added).²⁶

Providing immunity to contractors who voluntarily purchase compensation coverage for employees of other employers would reward such actions, and would subvert Congress' expressed policy that the employer should bear the cost of unsafe work conditions. The clear statutory language of Sections 904(a) and 932(a) places the financial burden on the direct employer to satisfy the safety requirements of Section 941(a) of the Act. The desire of Congress to promote a safe workplace, as expressed in the Act and its legislative history, should be respected. Therefore, statutory immunity should be denied.

- C. Since WMATA is not a contractor but an owner-contractee, it has neither a primary nor secondary obligation to provide workers' compensation coverage.

WMATA cannot, of course, claim the benefit of any immunity which attaches to the contingent liability imposed on contractors by Section 904(a) of LHWCA unless it is, in fact, a contractor within the meaning of Section 904(a). As this Court has stated, the words used by Congress should be given their ordinary meaning unless a contrary legislative intent has been clearly expressed. *American Tobacco Co. v. Patterson*, 456 U.S. 63, 68 (1982); *Burns v. Alcala*, 420 U.S. 575, 580-81 (1975). As the following discussion will show, WMATA does not qualify as a contractor according to either commonly understood definitions of the term or the usage of the construction industry. Moreover, prior to this litigation, neither the Authority, its con-

²⁶ Barrett, *Insurance for Urban Transportation Construction* at 1-20. A. A. Mathews Inc., *Guidelines for Improved Rapid Transit Tunneling Safety and Environmental Impact. Volume I: Safety* at 3-3 to 3-6, J.A. 73-77;

The Washington Star Reported in the summer of 1981 that:

"During the first several years of Metrorail construction, the transit agency's accident rate exceeded the national average because Metro paid insurance claims and it made no financial difference to contractors if they had a bad safety record. The attitude among many contractors was 'If you're not paying the bill what difference does it make?' said [David] Shilling [a project monitor.]

Washington Evening Star, June 16, 1981 at B1-B3.

tractors, the courts nor the commentators considered WMATA, or entities like WMATA, a contractor. Finally, the purposes of contractor-under provisions such as Section 904(a) of the LHWCA are not served by imposing secondary compensation liability on entities such as WMATA.

In order to be considered a contractor, an entity must have a contractual obligation to another to supply certain work or perform at an agreed price. Dictionary definitions place particular emphasis upon the use of the term to refer to one in the building or construction trades.²⁷ In the construction industry, prime contractors and subcontractors are distinguished from the owner of the project. According to the author of a reference book on construction contracting,

The owner, whether public or private, is the instigating party that owns and finances the project, either from the owner's own resources or from some source of external financing. *Public owners are public bodies of some kind ranging from agencies of the federal government down through the state, county, and municipal entities to a multiplicity of local boards, commissions and authorities.*

* * *

The prime contractor, also known as the general contractor, is the business firm that is in contract with the owner for the construction of the project, either in its entirety or for some specialized portion thereof.

R. Clough, *Construction Contracting* at 3 (4th Ed. 1981) (emphasis added).²⁸

As WMATA concedes, it is a governmental agency created pursuant to "the WMATA Compact," an agreement between Maryland, Virginia and Congress, which acted on behalf of the District of Columbia. Section 12 of the Compact conferred upon the Authority all of

²⁷ See, e.g., *Webster's New Collegiate Dictionary* (1980); *Webster's New World Dictionary*, (Second College Ed. 1979).

²⁸ The authors of a study commissioned by the U.S. Department of Transportation to assess the safety problems in rapid transit tunneling projects, in referring to WMATA as the owner of the Metro project, clearly contemplated definitions of owner and contractor substantially similar to those given by Dr. Clough. A. A. Mathews, Inc., *Guidelines for Improved Rapid Transit Tunneling Safety and Environment Impact, Volume 1: Safety*, at 3-4, J.A. 73-74.

the typical powers of an owner of real estate, including the legal authority to construct, acquire, own, maintain, control or convey real estate. Nowhere did Congress or the states evidence an intent to create (or that WMATA should create) a construction company, and nowhere did it oblige WMATA to build a subway itself. Rather, the Compact delegated to WMATA the usual and expected responsibilities of an owner: to develop a plan for the project, to institute that plan by contracting with others to build it, and to monitor and supervise the project.²⁹

The record in this case plainly establishes that WMATA is a public owner as defined by industry practice and that it consistently considered itself as such prior to this litigation. In the Authority's insurance specifications, its safety program manual, the design and construction manual, and its construction contracts themselves, WMATA is referred to simply as "WMATA" or "the Authority." The construction companies with whom WMATA contracts are referred to as "contractors" or "prime contractors" and second level contractors are referred to as "subcontractors." (J.A. 104-111, 133-139, 164-166, 190-218, 219-221, 222-224).³⁰

A second, and equally important, reason why WMATA cannot be considered a contractor is that it does not have a contractual obligation. The signatories to the Compact created WMATA. WMATA's powers and obligations are therefore statutory, not contractual, in nature. If WMATA does not have a contractual duty to build the Metro system, then the construction companies with which it contracts cannot be subcontractors.³¹

WMATA's basis for claiming that it is a contractor within the meaning of Section 904(a) is three-fold: First, it claims that the WMATA contract is akin to a contract between the signatories by which a joint obligation to build the Metro system was created. This con-

²⁹ D.C. Code Ann. § 1-2431 [4] [12-15] (1981).

³⁰ The judiciary has also recognized that WMATA is an owner. See, *WMATA v. Mergentime Corp.*, 626 F. 2d 959 (D.C. Cir. 1980). The contract documents discussed by the *Mergentime* court specifically referred to WMATA as "owner" of the Metro construction project.

³¹ According to *Webster's New Collegiate Dictionary* (1980), a subcontractor is "an individual or business firm contracting to perform part of all of another's contract."

tractual obligation, claims WMATA, was then delegated to the Authority, creating WMATA's contractual obligation.³² Respondents have been unable to find any legal support for the proposition that WMATA assumed a contractual obligation simply by coming into existence.

Second, WMATA claims that it should be deemed a contractor because it could have built the entire system itself. Theoretically, any owner could form his own construction company rather than hiring a contractor. Undoubtedly, owners do on occasion perform their own work. WMATA has conceded, however, that it would have been extremely difficult and impractical for WMATA to construct the subway system itself. (J.A. 277). In any event, theoretical ability to construct the system does not transform an owner into a contractor.

Third, WMATA claims that it is the "overall general contractor" for the Metro Construction Project because it, and only it, has an obligation with regard to the entire project. WMATA argues that the parties referred to in WMATA's construction contracts as prime contractors are in reality subcontractors because they are responsible only for a portion of the system (J.A. 276-271). This conception of the relationships between WMATA and the contractors is, again, not consistent with the ordinary meaning accorded these terms by the construction industry.³³

The only frank and accurate description of WMATA's position is that WMATA believes that it should be deemed a contractor for purposes of Section 904(a) despite the fact that it is not a contractor but an owner.³⁴ Given that WMATA is clearly not a contractor within the plain meaning of the term, WMATA must show evidence of a "clearly

³² This interpretation of contract law was first suggested by Delmer Ison, WMATA's director of insurance claims. (J.A. 234-35, 253-54, 276-77, 279-300). Mr. Ison stated that he first came to the conclusion that WMATA was a contractor when preparing an affidavit for purposes of WMATA's motion for summary judgment (J.A. 296).

³³ See R. Clough, *Construction Contracting* at 11.

³⁴ In fairness to WMATA, some Courts have done so. Professor Larson has characterized the reasoning of these courts as "rather desperate attempts to maximize the protective reach of the statute." ICA. Larson, *The Law of Workmens Compensation*, § 49.11 at 9-10 (1983).

expressed legislative intention" that Congress meant "contractor" to mean "contractor or owner." *Rodriguez v. Compass Shipping Co.*, 451 U.S. 596, 603, 604 (1981). No such expression of congressional intent exists, and none should be presumed.

The distinction between a contractor and an owner is much more than one of semantics. According to Professor Larson, the purpose underlying statutory provisions such as Section 904(a) is both to prevent evasion of workers' compensation acts by those who would subdivide their regular operations among irresponsible contractors, thus avoiding compensation liability and thereby effecting a cost saving, and second, to protect the employee from such uninsured subcontractors. IC A. Larson, *The Law of Workmen's Compensation*, Section 49.11 at 9-12 to 9-16 (1983). Professor Larson states that virtually all courts that have addressed the issue consider whether the subcontracted work is work which the employer, or other employers, would ordinarily do through employees, and indicates that another helpful test is whether the employer has the manpower and the tools to perform such work.³⁵ WMATA clearly does not satisfy either of these tests. Given the lack of persuasive reasons for ignoring the plain meaning of the statute and the common understanding of the term contractor, WMATA's arguments are best addressed to Congress.

III. The Appellate Case Law Unanimously Supports The Conclusion That The Petitioner Is Not Immune From Suit Under Sections 904(a) and 905(a)

Since the LHWCA was enacted in 1927, not a single appellate decision has found a general contractor to be immune under Section 905(a) from a suit for negligence by an injured employee of its subcontractor. *Probst v. Southern Stevedoring Co.*, 379 F.2d 763 (5th Cir. 1967); *DiNicola v. George Hyman Construction Co.*, 407 A.2d 670 (D.C. App. 1979); *Fiore v. Royal Painting Co.*, 398 So.2d 863 (Fla.

³⁵ See A. Larson, *The Law of Workmen's Compensation* § 49.11 at 9-16, 9-22, 9-41 (1983). The reason for these tests is, of course, that it would be unlikely that a contractor (or owner) would subcontract work for the purpose of evading the compensation law if it is not the type of work which he would under normal circumstances do himself.

App. 1981).³⁶ The only circuit court case which discussed this issue prior to the decision below was the Fifth Circuit's 1967 decision in *Probst v. Southern Stevedoring Co.* In *Probst*, the injured employee of a stevedoring subcontractor sued the general contractor in tort, pursuant to Section 933(a) of the Act. The general contractor claimed immunity under Section 905 by virtue of its statutory obligations under Section 904(a). The court denied the contractor's immunity claim, stating that it is clear from the language and structure of the Act that every employer, including a subcontractor, is primarily liable for and required to secure the payment of workers' compensation benefits to his employees. The court stated that the liability of a general contractor is secondary and protective in nature, and reasoned that this secondary, protective liability does not make the general contractor an "employer" within the meaning of Section 905(a).

The reasoning of the *Probst* court parallels closely the reasoning of the New York Court of Appeals in *Clark v. Monarch Engineering Co.*, 248 N.Y. 107, 161 N.E. 436 (1928). Since the two statutes contain substantially the same provisions, this result is not unexpected. The two cases even leave open the very same question: whether a general contractor called upon to pay compensation benefits to a defaulting subcontractor's employee obtains the employer's immunity under Section 905(a).

The New York Court of Appeals addressed that question in *Sweezy v. Arc Electrical Construction Co.*, 295 N.Y. 306, 67 N.E.2d 369 (1946), and held that the general contractor remains a third party amenable to suit even when it must make compensation payments to employees of a subcontractor. The only case to address this issue under the LHWCA reached the same conclusion as the New York court. In *Fiore v. Roydl Painting Co.*, a Florida appellate court, interpreting an extension of the LHWCA, held that the general contractor was amenable to suit even where its subcontractor's insurance had lapsed and it had commenced paying worker's compensation benefits to the subcontractor's employee's widow. The court held that,

³⁶ The local District of Columbia Courts presume that the general contractor is amenable to suit by employees of its subcontractors. See, e.g., *Martin v. George Hyman Construction Co.*, 395 A.2d 63 (D.C.App. 1978) (effect of violation of Safety Regulations enacted for benefit of class of worker of which plaintiff is a member).

despite this payment of benefits pursuant to the contractor's secondary duty under Section 904(a), the contractor remains a third person amenable to suit. The court reasoned that granting immunity "would reward a general contractor for failing to attend to its duty to assure that its subcontractor has the requisite coverage." *Fiore*, 398 So.2d at 865.

The decision below leaves open the question of whether a general contractor may obtain immunity if required to pay compensation to an employee of a defaulting subcontractor, and implies that the court might not be inclined to follow *Fiore* if such a situation arose (Pet. App. 53a, n.15). However, the only two courts that have been presented with the issue have recognized that, under the LHWCA, the only *quid pro quo* is between the employer and his employee. The employer *must* pay workers' compensation benefits to the employee, regardless of fault, and in return, the employee gives up his right to sue his employer in tort. The contractor's role is to enforce the subcontractor-employer's side of the "bargain."³⁷ As the discussion in Part I and Part II above demonstrates, it is quite clear from the language and structure of the Act that Congress did not believe that this role merited an extension of immunity in derogation of the employee's common law rights. Granting an employer's immunity to a general contractor would encourage general contractors to hire non-complying subcontractor-employers, and would undermine job safety, which the LHWCA seeks to promote.³⁸

³⁷ The *Fiore* court's conclusion is further supported by the fact that, in the event that the contractor must pay compensation to a subcontractor's employee, the contractor and his carrier have a right of indemnity against the subcontractor. *Sweezy*, 295 N.Y. at 308, 67 N.E. 2d at 371. See also, A. Larson, *The Law of Workmen's Compensation*, § 49.11 at 9-3 (1983).

³⁸ See, A. Amchan, "Callous Disregard" for Employee Safety: The Exclusivity of the Workers' Compensation Remedy against Employers, *Labor Law Journal*, 683, 686-7 (Nov. 1983).

IV. Contrary To The Allegations Of Petitioner, The Court Of Appeals' Decision Promotes The Purposes Of The Longshoremen's And Harbor Workers' Compensation Act.

- A. The Court of Appeals' decision will promote rather than undermine Congress' intent to ensure employee compensation coverage and allow third party actions except against the employer.**

Petitioner argues that the "immediate and most damaging effect" of the Court of Appeals' decision is that it will lead to lapses in insurance coverage under the Act. As the following discussion will show, this allegation fails to appreciate that the statutory scheme recognized by the Court of Appeals has been successful since its inception. Moreover, WAMTA's claim is clearly unsupported by the practices of the insurance industry, the rational actions of general contractors and the record in this case.

WMATA's argument proceeds on the false premise that, absent wrap-up insurance, a contractor could not and would not know if and when a subcontractor had obtained insurance coverage. This is patently untrue. The very reason that "contractor-under" provisions such as that in Section 904(a) appear in virtually every compensation act is that the secondary liability imposed by such provisions provides an important incentive to contractors to find out whether, and to make sure that, their subcontractors are insured. It would not seem impractical for WMATA to send a simple form letter to each of its "subcontractors," requiring proof in advance that they are properly insured, requiring prompt notice of cancellation of insurance, and making payment of the contract price contingent on satisfaction of such conditions. For more than fifty years, employers have been insuring their employees under this statutory scheme, and petitioner has not cited to a single instance where a subcontractor's failure to secure insurance under the LHWCA has resulted in an employee failing to receive compensation benefits.³⁰ The reason is obvious—the scheme works.

³⁰ The District of Columbia Workers Compensation Act of 1979, D.C. Code Ann. § 36-301 *et seq.*, (1981) adopts the relevant language of Sections 904(a) and 905(a) as Sections 36-303(c) and 36-304(a) of the new Act. The fact that these sections were adopted without change demonstrates just how effectively the law has arranged coverage.

Moreover, petitioner misapprehends the import of the decision below concerning the character of contractor's liability, and ignores the rational and well-established practices of the insurance industry. While the courts have uniformly refused to grant immunity to the contractor where the subcontractor has not failed to satisfy his primary statutory duty to provide workers' compensation coverage, no court has ever stated that it would be improper or illegal for a contractor to purchase insurance in advance to protect against subcontractor default.⁴⁰ In fact, purchasing such protective insurance would be the only rational thing to do, and all insurance policies written to cover general contractors expressly provide such coverage. The underwriting rules issued by the National Council on Compensation Insurance note that under most workers compensation laws the contractor is responsible for the payment of benefits to employees of its uninsured contractors, and specifically provide that the contractor's statutory responsibility is *automatically* insured by the Council's standard policy. National Council on Compensation Insurance, *Basic Manual for Workers' Compensation and Employers' Liability Insurance*, Rule IX-C, R-20, 21 (3d Reprint 1983). The Council provides that the contractor shall furnish satisfactory evidence that the subcontractor had workers' compensation insurance in force covering work performed for the contractor. *Id.* at R-20. If the contractor provides such evidence, he is assessed no additional premium. If he does not, he is simply charged the same premium that the subcontractor, given his payroll and experience modification, would normally be charged.

In summary, it is clear that the incentives that have always existed for general contractors to purchase protective insurance coverage remain unaltered and that no "gaps in coverage" need occur. It is not

⁴⁰ Petitioner's claim that the Court of Appeals' decision throws into question whether contractors have "employer" responsibilities is entirely without merit. The Court of Appeals did not say or imply, as WMATA alleges, that a "volunteer" such as WMATA has no employer duties. It stated only that the voluntary payment of benefits by one who does not have a statutory duty to pay does not provide the payor with immunity. Section 904(a) states quite clearly, moreover, that a contractor whose secondary duties are invoked is responsible for all the benefits payable under Sections 907, 908 and 909. Obviously, the contractor would also be responsible for obeying other sections which relate to the payment of those benefits.

necessary to provide an additional incentive to general contractors to attend to their clear statutory responsibilities by rewriting the Act to provide them with immunity from suit.

B. The Court of Appeals' decision should not impede the delivery of benefits under the LHWCA.

Petitioner argues that denying immunity to contractors "like WMA-TA" will frustrate Congress' interest in the prompt and certain disposition of claims, because such contractors are given an incentive to contest claims in order to avoid conceding that an injury is work-related and to avoid providing funds for the tort suit. As the following discussion will show, such conflicts do not exist absent wrap-up insurance, and may well be the most dangerous of its disadvantages.

Under typical insurance schemes, the employer pays the premium and has a common interest, with its carrier and the employee, in pursuing actions against negligent third parties.⁴¹ As Congress has recognized, such third party actions encourage safety because they encourage safe conduct.⁴² Under the Court of Appeals' decision and a standard insurance plan, these interests are promoted, and no conflict of interest occurs. Under wrap-up insurance, however, the interests of the compensation carrier are at odds with those of the employee, both because a potential third party pays the insurance premiums and because the same carrier covers all compensation and liability losses on the project. This creates a disincentive for the carrier to pursue third-party actions, and an incentive to avoid investigation of the circumstances surrounding accidents or to withhold any information obtained from the employee, in many cases effectively preventing the injured employee from pursuing his third-party rights.⁴³

⁴¹ The most important exception to this rule is the conflict of interest which results when the compensation and liability carriers are the same. *Czaplicki v. The Hoegh Silvercloud*, 351 U.S. 525 (1955). While the continuing vitality of the *Czaplicki* exception to the assignment provisions of Section 933(b) has not yet been decided by this Court, there is no question that the problems recognized by the *Czaplicki* Court are common, particularly with the advent of wrap-up insurance.

⁴² H.R. Rep. No. 92-1441, 92nd Cong. 2d Sess. 6 (1972). See generally, W. Prosser, *Handbook of the Law of Torts*, Ch. 1 (4th Ed. 1971).

⁴³ National Loss Control Service Corporation ("NATLSCO"), the subsidiary of Kemper Insurance Company responsible for adjusting both compensation and liability

Moreover, this conflict of interest also provides incentives to contest the employee's compensation claim, for the reasons discussed in petitioner's brief.⁴⁴ Carriers like LMC will hopefully ignore such temptations, and will adhere to their responsibilities to their named insured and the insured's employees to pay claims expeditiously. But the clear conflicts of interest created by the wrap-up program nevertheless cannot be denied, and if the contractor or owner who purchases the policy exerts the control over the carrier suggested by WMATA's brief, such results are inevitable.⁴⁵

In summary, the Court of Appeals' decision does not in any way affect the traditional legal relationships existing on multiple employer construction projects and, therefore, does not create the anomalous result suggested by petitioner. If such results do occur, and if they are violative of the spirit and intent of the Act, they are a product of wrap-up insurance.

C. The third party actions allowed by the Court of Appeals are a remedy that has been permitted by the LHWCA since its inception

Petitioner and *amici* argue that the Court of Appeals decision will create a "massive spate" of burdensome litigation, unprecedented in the history of the courts, and not within the contemplation of Congress. Petitioner and *amici* repeatedly cite the 1972 amendments and

claims under the CIP, routinely withholds investigative information from claimants and plaintiffs' attorneys.

⁴⁴ Petitioner claims that a reversal of the Court of Appeals' decision would obviate this problem. This claim is not accurate. If the immediate employer gives up his immunity to WMATA and becomes a third party subject to suit, the carrier would still have the same incentive to contest the compensation claim in order to defeat the possibility of a liability claim.

⁴⁵ One of the claimed advantages of wrap-up insurance is that administrative savings occur because disputes over which contractor is responsible for benefits are rendered irrelevant. *See, eg., Becker and Denenberg, Wrap-Up of the Wrap-Up* CPCU Annals at 202 (Sept. 1967). Unfortunately, this does not always occur. Recently, LMC asserted in an occupational disease claim that the statute of limitations had run because the claim was filed against one member of a joint venture rather than against the joint venture. The Administrative Law Judge rejected this defense, stating that the "carrier may not escape liability by simply playing a corporate 'shell' game" *Gilmore v. Peter Kiewit Sons Co., Inc.*, 83-DCWC-89 at 3 (Feb. 23, 1984).

the accompanying House and Senate reports to support the contention that Congress intended to end third party actions. In 1972, Congress eliminated suits by longshoremen against the shipowner based on the doctrine of "unseaworthiness," which made the shipowner liable regardless of fault. The "unseaworthiness" remedy, combined with the very high accident rate in the longshore industry and numerous indemnity suits by shipowners against stevedores, had caused the court congestion referred to by petitioner. The 1972 amendments were intended to remedy this problem, and embodied a trade of sorts: the longshoremen's compensation benefits were substantially increased, and the shipowner no longer had to protect against suits *not* predicated on negligence. In addition, indemnity agreements between shipowners and stevedores were voided, thus eliminating further costly litigation and making the longshoreman's and stevedore's interest in recovering damages in a third party negligence suit identical. See generally *Rodriguez v. Compass Shipping Co.*, 451 U.S. 596, 616-617, (1981); *Bloomer v. Liberty Mutual Insurance Co.*, 445 U.S. 74, 82-84 (1980).

Suits based on negligence were specifically left untouched in 1972, Congress leaving no doubt that it believed that such suits would further the interest of protecting the health and safety of employees. H.R. Rep. No. 92-1441, 92d Cong., 2d Sess. at 6-7. As petitioner and amici should be aware, the Court of Appeals has created no new remedies, and has not allowed any suits apart from those that have been clearly permitted by the plain language of the LHWCA since its enactment in 1927 and that have been unanimously approved by the courts interpreting the Act.

Petitioner's argument that further litigation will result due to gaps in coverage caused by the claimed inevitable termination of wrap-up insurance is also without foundation. As discussed in Part V of our argument, the Court of Appeals decision will not cause the termination of the CIP. Moreover, even if wrap-up were terminated, the elective remedy suits discussed by petitioner need not occur. If WMATA gives adequate notice to the Metro contractors of the termination of the CIP, they will undoubtedly purchase all insurance necessary to prevent gaps in coverage.

Petitioner's argument that the Court of Appeal's decision will cause indemnification suits arising out of agreements between WMATA and

its contractors must fail because, again, it is based on the false premise that the Court of Appeals decision marks the end of wrap-up insurance. Moreover, whether such indemnity agreements are valid under the LHWCA is a matter of law that has nothing to do with on the proper interpretation of Sections 904(a), 905(a), and 933(a) and which, in fact, is an issue addressed by Congress in 1972 and which is currently before the courts *precisely because* third party actions such as these cases are permitted by the Act.⁴⁶

In summary, respondents' actions are clearly permitted by the Act, and are entirely within the contemplation of Congress. Whether the remedy is to be exercised by the injured employee is a matter for the employee to decide, and which depends on the totality of the circumstances in any case.⁴⁷ If petitioner desires to amend the Act to preclude third-party actions, its argument, again, should be addressed to the legislature.⁴⁸

V. The Court Of Appeals' Decision Will Produce None Of The Anomalous Results Alleged By Petitioner. And Such Considerations Do Not, In Any Event, Justify Ignoring The Plain Language Of The Act Or The Clear Intent Of Congress.

Petitioner argues that the Court of Appeals' decision will produce a variety of "anomalous results." As the following discussion will show,

⁴⁶ The District of Columbia Court of Appeals has expressly left open the issue of whether indemnity agreements between contractors and subcontractors are barred by Section 905(b) of the Act. *DiNicola v. George Hyman Construction Co.*, 407 A. 2d 670, 675 (D.C. App. 1979). The United States Court of Appeals for the District of Columbia Circuit has not been presented with the issue. At least one district court judge has stated that Section 905(b) is applicable to the District of Columbia. *Walker v. Bechtel Associates Professional Corp.*, No. 81-1125 (D.D.C. Feb. 4, 1982).

⁴⁷ Contrary to petitioner's statements, suits are not now being filed at the rate of two to four per week. Approximately 110 suits have been filed pursuant to Section 933(a) of the Act since early 1981. Respondents submit that this does not qualify as a litigation explosion, particularly given the number of injuries for which compensation has been paid.

⁴⁸ Petitioner implies that one need not be concerned about respondents right to pursue actions against third persons because only the attorneys will benefit. *Amicus Alliance of American Insurers* goes one step further, implying that suits are brought with the attorney primarily in mind. These arguments are, of course, entirely extralegal, and should have no application to the interpretation of the plain language Sections 905(a) and 933(a) of the Act.

none of these "anomalous results" will occur. More importantly, however, WMATA does not even attempt to demonstrate that these "policy considerations," even if accurate, reflect palpably on Congress' intent in enacting the LHWCA or that they justify ignoring the plain language of the Act.

- A. **Wrap-up will be terminated only if the contractors and subcontractors covered thereunder are found not to have secured compensation within the meaning of Section 904(a), thus subjecting them to suit as a third party or to an elective remedy under Section 905(a).**

Petitioner's claim that wrap-up insurance is dead rests on a number of false premises, the most obvious of which is the claim that the Court of Appeals' decision has diminished the cost-effectiveness of wrap-up insurance. The success of wrap-up programs in general, and of the CIP in particular, has never been founded on cost savings realized by substantial changes in the legal relationships between owners, contractors, subcontractors and their employees. To the contrary, the cost effectiveness of wrap-up insurance is based largely on administrative savings, reduction of construction costs, stimulation of competition in the insurance industry, the economies of scale, and the elimination of subrogation suits, which become unnecessary when all risks are covered by the same carrier.⁴⁹ While the commentators disagree somewhat as to the relative importance of various cost factors, none has suggested the possibility that cost savings might be realized by the elimination of third-party lawsuits. Since none of the cost savings estimated prior to the institution of wrap-up insurance were based on this factor, and since none of the actual cost savings realized since then have been due to successful claims of immunity, it is difficult to understand how the Court of Appeals' decision will suddenly cause the collapse of the CIP. WMATA had no immunity prior to wrap-up, has had none between 1971 and 1984, and will not suffer unexpected or increased responsibilities if it remains subject to suit.

⁴⁹ See eg., Barrett, *Insurance for Urban Transportation Construction*, Report No. UMTA-MA-06-0025-77-13 at 1-8 (Dept. of Transp. 1977); Ashley, *Preliminary Insurance Program Selection for Urban Mass Transit Project Construction*, Report No. UMTA-NY-06-0071-81-1 at 14 to 21 (Dept. of Transp. 1981); Becker and Denenberg, *Wrap-Up of the Wrap-Up*, CPCU Annals 202-204, 211 (Sept. 1967).

Even assuming that immunity for WMATA was an expected benefit of the CIP (there is, of course, no evidence that this was the case), such immunity would nevertheless not result in the savings of public funds claimed by the Authority. The logical product of WMATA's arguments is a scheme by which the immediate employer would be subject to suit as a third party. Respondents assert that, if anything, this would lead to more tort litigation, and increased insurance costs. The litigation currently pending in the District Courts and the local courts is based, in most cases, on the failure of Bechtel and WMATA to properly attend to their duties to ensure reasonably safe conditions in the workplace, to enforce federal and local safety standards, and to compel compliance by contractors when necessary. *See, e.g., Johnson v. Bechtel Associates Professional Corporation, D.C.*, amended complaint J.A. 1, N.R. 54. In virtually all of these cases, the immediate employers of the injured workers were equally at fault for breaches of similar duties. In some, the negligence of the employer was active, while that of WMATA and Bechtel was passive in nature. Since active negligence is far easier to prove than passive negligence, it would appear that the scheme proposed by WMATA may well result in more and larger awards than would the traditional scheme.⁵⁰

The wrap-up insurance plan will collapse only if it is determined by Congress, the District of Columbia government, or the courts that the plan violates public policy and may no longer be used, or if it is determined that it does not satisfy the employer's duty under Section 904(a), or the equivalent provisions of the District of Columbia Workers' Compensation Act of 1979.⁵¹ Since the Court of Appeals' decision is

⁵⁰ The scheme proposed by WMATA would result in substantial savings only if LMC could also avoid responsibility for the contractors' torts. Respondents expect that the contractors would attempt to claim both that Section 904(a) grants them immunity, and that WMATA exercises sufficient control over their activities so that they are entitled to the immunity provided to agents of WMATA by Section 80 of the WMATA Compact.

⁵¹ There is no question that wrap-up programs are problematic, despite possible but by no means undisputed economic advantages. As commentators have noted, and as the Court of Appeals implied, such insurance programs remove the contractor's vested interest in safety. *See, e.g., A. A. Mathews, Inc., Guidelines for Improved Rapid Transit Tunneling Safety and Environmental Impact, Volume I: Safety, Report No. UMTA-MA-06-0025-77-7 at 3-3 to 3-6 (Dept. of Transp. 1977); Becker and Denenberg, Wrap-Up of the Wrap-Up, at 202, 206, 208; National Academy of Science,*

not premised on either of these conclusions, however, the future of wrap-up is not material here.³² In summary WMATA has neither shown that the decision of the Court of Appeals will diminish the use of comprehensive insurance plans nor has it explained why such a result provides a justification for ignoring the plain language of the LHWCA.³³

B. Whether the Court of Appeals' decision will subject WMATA to divergent liability within the Metro System is irrelevant to the interpretation of the LHWCA.

WMATA and *amici* Commonwealth of Virginia and State of Maryland claim that it is "important to emphasize" that the law of Virginia and Maryland would provide immunity to WMATA, and that a denial of immunity to WMATA under the Act would subject WMATA to an "intolerable" divergent liability within the Metro system. WMATA and *amici curiae* fail to explain, however, how the workers compensation laws of Virginia and Maryland are relevant to the interpretation of a Federal Act or to the intention of Congress in enacting that legisla-

Better Contracting for Underground Construction, PB-236973 at 35-39 (1974); R. Poulton, *Disadvantages of Wrap-Up Plans*, CPCU Annals (Winter 1965).

The Court of Appeals concluded that WMATA "circumvented the statutory scheme" by instituting wrap-up but expressed no opinion on the issue of whether wrap-up satisfies the contractors' Section 904(a) duty (Pet. App. 56a). The District of Columbia Court of Appeals has held that, although WMATA paid the premiums, the immediate employers secured the compensation insurance within the meaning of Section 904(a). *Edwards v. Bechtel Associates Professional Corp.* D.C., 466 A.2d 436, 438 (D.C. App. 1983).

³² It should also be noted that, although Congress has not precluded the use of wrap-up insurance, it apparently has not discussed its propriety in the context of the requirements of the LHWCA. Legislative inaction does modify the plain terms of the Act. *Rodriguez v. Compass Shipping Co.*, 451 U.S. 596, 615 (1981).

³³ WMATA suggests that Congress would be "astounded to learn" that the money it has approved for wrap-up constituted "mere voluntary contributions" by WMATA to workers who may still sue WMATA in tort. Respondents submit that Congress would be astounded to learn that WMATA and its carrier have attempted to utilize a voluntary insurance program to substantially alter the rights and liabilities of every contractor and every worker on the Metro construction project, despite the fact that WMATA has reclaimed its insurance costs by ordering contractors to subtract such costs from their bids.

tion. While it would be difficult to deny that Congress' purpose was not to enact legislation resulting in diverging liability within the Metro system, it is equally incorrect to presume that the Congress that enacted the LHWCA was concerned with enacting a statute consistent with those of Maryland and Virginia. WMATA, like every other individual or entity, is subject to differing legal rights and obligations in the jurisdictions in which it operates. Whether the laws of Maryland or Virginia provide immunity to WMATA is simply not material for purpose of the present inquiry.

Moreover, the argument that a denial of immunity to WMATA would create divergent liability is based on the faulty premise that the laws of Virginia and Maryland clearly would immunize WMATA. In fact, this is not the case. Virginia extends immunity from suit by employees of subcontractors to owners (such as WMATA) or contractors only if the subcontracted work is of the type normally carried on through employees rather than independent contractors.⁵⁴ Maryland extends immunity only to principal contractors who contract to perform work which is part of their trade, business or occupation, and who subcontract the whole or any part of that work. Maryland does not extend immunity to owners under any circumstances.⁵⁵

Plainly, neither Virginia nor Maryland would extend immunity to WMATA under the facts of this case. Because WMATA is not in the construction business, a grant of immunity would neither be justified by the policies underlying statutory employer statutes, nor by the body of case law interpreting the statutes of Virginia and Maryland. To the extent, then, that consistent interpretation of the statutes of the three jurisdictions is a relevant policy consideration (and respondents do not so claim), such consistency supports a denial of immunity to WMATA.

⁵⁴ See e.g., *Vandergrift v. United States*, 500 F. Supp. 237 (E.D. Va. 1979), *aff'd*, 634 F.2d 628 (4th Cir. 1980); *Bassett Furniture Industries, Inc. v. McReynolds*, 216 Va. 897, 224 S.E. 2d 323 (1976); *Shell Oil Co. v. Leftwich*, 212 Va. 715, 187 S.E. 2d 162 (1972).

⁵⁵ See, e.g., *Honaker v. W. C. & A. N. Miller Dev. Co.*, 278 Md. 453, 365 A.2d 287 (1976); *Warren v. Dorsey Enterprises*, 234 Md. 574, 200 A.2d 76 (1964); *Honaker v. W. C. & A. N. Miller Dev. Co.*, 285 Md. 216, 401 A.2d 1013 (1979).

- C. The Court of Appeals' decision will not affect the participation of minority contractors in Metro contracting and such participation, though of value to society, is in any event not relevant to the interpretation of Sections 904(a) and 905(a) of the LHWCA.**

The argument that the Court of Appeals' decision will prevent minority owned construction companies from participating in construction projects subject to the LHWCA is premised on the validity of WMATA's claim that the decision marks the end of wrap-up programs. As discussed above, the continuing viability of wrap-up insurance plans will be determined not by the issue of WMATA's amenability to suit in these cases, but by whether such plans are found consistent with the purposes of the Act. The Court of Appeals' decision does not change the longstanding and heretofore undisputed legal relationships on construction jobsites, does not affect the profitability of wrap-up insurance, and thus will not affect the ability or incentive of WMATA to hire or to fund the hiring of minority contractors.³⁶ While the concerns of the minority contractors are understandable, they are neither well founded nor are they relevant to the issues of statutory construction presented by these cases. Wrap-up insurance claims many advantages, and must concede many disadvantages, some of which are discussed above. One of the primary positive effects claimed by proponents of wrap-up insurance is that it allows minority owned companies, and new and small companies in general, who may otherwise be uncompetitive in the marketplace, to bid on and participate in large construction projects.³⁷ Certainly, an argument may be made

³⁶ The assertion that Metro contractors will be tempted to use fewer minority subcontractors is without merit. First, to the extent that possible third party liability is a disincentive to subcontracting, such has been a fact of life since Congress decided in 1959 that employees need not elect their remedies. Second, WMATA can and does, by contract, set out specific requirements for the award of subcontracts and retains the right to approve subcontractors (J.A. 192-193, 195, 197-198, 203). Third, specialty work traditionally performed by subcontractors cannot as a practical matter be performed by general contractors who do not have the necessary expertise, and who are primarily concerned with the structural integrity of the project. Moreover, if Congress had desired to promote subcontracting at the expense of third-party actions, it undoubtedly would have repealed Section 933 of the Act.

³⁷ While wrap-up does afford a benefit to subcontractors who simply cannot afford to pay for insurance, it is not the practice of the insurance company to charge higher premiums, as the National Association of Minority Contractors claims, because such

that affirmative action goals and concern for the growth of small business in general outweighs the inherent safety risks of subcontracting to new and unestablished firms. The fact that such policies concern WMATA, and that the federal government encourages the participation of minority enterprises in federally funded programs does not, however, justify ignoring the plain language of the LHWCA or the clear intent of Congress. Sections 905(a) and 933(a) of the Act relate to the interaction of workers' compensation and tort law, and the principles and policies, such as industrial safety, the economic protection of workers, and the moral responsibility for wrongs, which form the foundation of these laws. While the concerns expressed by WMATA and the National Association of Minority Contractors would perhaps be relevant to the interpretation of certain types of statutes, they should not affect the interpretation of a statute which expresses no concern for the cost of insurance or the promotion of small business, and which is color-blind.

VI. If Immunity Is Granted To WMATA, That Immunity Should Extend Only To Suits Based On Tortious Acts Committed By WMATA And Its Officers And Employees.

If this Court decides that WMATA, by virtue of its initiation of the CIP, is entitled to the immunity extended to employers by Section 905(a), it must then decide what scope to give that immunity. The only interpretation of that scope which harmonizes the purposes of Section 933(a) with those of Section 80 of the WMATA Compact limits any grant of immunity to WMATA to suits based on alleged tortious conduct by the Authority or its employees. Perhaps more than any issue, the issue of the interrelationship of Section 80 and the LHWCA brings into play the principal that the "Act must be liberally construed in conformance with its purpose, and in a way which avoids harsh and

subcontractors cannot guarantee timely payment of premiums. *See, generally, National Council on Compensation Insurance, Basic Manual for Workers' Compensation and Employers Liability Insurance* (1980). It is similarly unsubstantiated and untrue that small contractors are forced to turn to unreliable and financially weak insurance companies. If the contractor has difficulty purchasing insurance on the open market, he may request an "assigned-risk" policy, which will be provided, at competitive rates, by a financially secure and reliable carrier. *See, generally, Northeastern Council on Compensation Insurance, District of Columbia Workers' Compensation Plan, Information and Procedures*, (1st Reprint 1984).

incongruous results." *Director, OWCP v. Perini North River Associates*, 103 S. Ct. 634, 637 (1983) quoting *Voris v. Eikel*, 346 U.S. 328, 333 (1953)). The interpretation of Section 905(a) advanced by petitioner would result in *no one* being responsible for the tortious conduct of Bechtel, a result surely not in the contemplation of Congress, and clearly violative of public policy.

Section 80 of the WMATA Compact provides that WMATA is liable for torts committed by its directors, officers, employees and agents in the exercise of proprietary functions, and that the exclusive remedy for such torts is by suit against the Authority. Section 80 does not purport to bar any causes of action or to limit substantive rights of injured workers such as respondents in any way. Section 80 merely prescribes that the sole *remedy* for the torts of agents such as Bechtel is by suits against WMATA.⁵⁸

⁵⁸ As petitioner has noted (Pet. Br. at 10 n.14), respondents also sued Bechtel, the contractor responsible for the supervision of safety on the Metro Construction project. The parties agreed that Metro Construction was a proprietary function, but disputed Bechtel's role as an agent of WMATA within the meaning of Section 80.

At the evidentiary hearing in the *Johnson* case, counsel for WMATA indicated that WMATA was not concerned with the Section 80 aspect of the litigation, because WMATA provided the insurance for both WMATA and Bechtel, and any recoveries would come from the same "pot of money." At the hearing, the judge granted plaintiff's motion to add WMATA as a party defendant, and stated that WMATA could file a memorandum of law concerning the Section 80 issue if it desired. *Johnson v. Bechtel Associates Professional Corp., D.C.*, evidentiary hearing, May 17, 1982 at 8-9. It is clear from the fact WMATA never at any stage of the litigation opposed Bechtel's motion for summary judgment that it accepts responsibility for Bechtel's torts pursuant to Section 80.

Although Counsel for WMATA indicated that it did not matter, practically speaking, whether WMATA or Bechtel was responsible for Bechtel's torts, because both were covered by the wrap-up insurance plan, WMATA now claims that Section 905(a) and Section 80 of the Compact should be interpreted as interacting to destroy respondent's causes of action. Interestingly, WMATA answered the amended complaint three days later, claiming as an affirmative defense that complaint was barred by the Act. Within approximately a month the motion for summary judgment was filed (J.A. 1, 56, 62). It is obvious that WMATA and LMC have attempted to funnel all liability towards WMATA under Section 80, and then create an umbrella of immunity with Section 905(a) of the Act. If this Court decides that WMATA is entitled to immunity as a statutory employer, and respondents' employers succeed in obtaining immunity

By the same token, Section 933(a) of the Act permits suits against any third party except the injured person's employer or fellow employees. Even assuming that WMATA steps into the shoes of the employer for purposes of the immunity provided by Section 905(a), it would require a massive leap of illogic to hold that WMATA is immune not only from suits premised on breaches of WMATA's duty to respondents, but also from suits based on breaches by Bechtel, for whose torts WMATA is held responsible *by statute*.⁵⁹ Even assuming the validity of WMATA's *quid pro quo* analysis, the rationale supporting Section 905(a) immunity does not apply to suits based not on WMATA's liability in tort, but rather compelled by statutory prescription.⁶⁰ Nothing in the language of either Section 933 or Section 905 indicates any intention on the part of Congress to bar anything other than causes of action in tort against the employer. The causes of action against WMATA based on the tortious acts of Bechtel are based, not in tort, but on the expressed purpose of the Compact signatories to assume liability for the torts of all agents.⁶¹

Granting full immunity to WMATA would also subvert the oft-stated principle that when "there are two acts upon the same subject, the rule is to give effect to both if possible . . ." *Morton v. Mancari*, 417 U.S. 535, 551 (1974) (quoting *United States v. Borden Co.*, 308

either under Section 80 of the Compact (as agents of WMATA) or under Section 905(a) of LHWCA, all or virtually all third party rights on the Metro Construction project will have been eliminated, creating a huge windfall for WMATA and its carrier.

⁵⁹ The complaints against WMATA in these cases contain counts based both on the negligence of WMATA and counts premised on WMATA's Section 80 liability. See, e.g., *Johnson*, amended complaint J.A. 1, NR. 54.

⁶⁰ These cases present the clearest possible case for application of the "dual capacity" or "dual-persona" doctrine. See, e.g., *Jones and Laughlin Steel Corp. v. Pfeifer*, 103 S.Ct. 2541 (1983).

⁶¹ This argument is further buttressed by the fact that WMATA would not be responsible, based on traditional tort concepts, for the torts of independent contractor-agents such as Bechtel. WMATA could be held liable for breach of a non-delegable duty if an agent such as Bechtel improperly performed its tasks. Such liability, however, has always been treated as the tort of the *contractee*, not that of the agent. See, e.g., *Lindler v. District of Columbia*, 502 F.2d 495 (D.C. Cir. 1974). Thus, WMATA cannot argue that limiting any grant of immunity as suggested here would permit respondents to recover for torts which would be barred by Section 905(a) absent Section 80. The cause of action does not *exist* but for Section 80.

U.S. 188, 198 (1939)). Assuming that WMATA is entitled to immunity at all, limiting that grant to counts based on the negligence of WMATA or its employees, for which WMATA would be vicariously liable under traditional tort concepts, would serve to best harmonize the purposes of Section 905(a) and 933(a) of the LHWCA with those of Section 80 of the Compact.

Denying immunity for counts based on Section 80 would also serve the principle that statutes should be construed, if possible, so as to render all parts operative. *Administrator, FAA v. Robertson*, 422 U.S. 255, 261 (1975). Such an interpretation would preserve both the traditional tort immunity accorded by Section 905(a) and the right to pursue claims for damages guaranteed by Section 933(a).

CONCLUSION

The Court of Appeals decision is entirely consistent with the plain language of all applicable sections of the LHWCA, and the voluntary institution of the CIP by petitioner does not provide a justification for ignoring that language. Since petitioner is a third party amenable to suit under the LHWCA, the judgment of the Court of Appeals should be affirmed and these cases should be remanded to the District Courts for trials.

Respectfully submitted,

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1983

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY,
Petitioner,

v.

PAUL D. JOHNSON, *et al.*,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the District of Columbia Circuit

REPLY BRIEF

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TABLE OF AUTHORITIES

Cases:	Page
<i>Anderson v. Thorington Construction Co.</i> , 201 Va. 266, 110 S.E.2d 396 (1959), <i>appeal dismissed</i> , 363 U.S. 719 (1960)	19
<i>Bloomer v. Liberty Mutual Ins. Co.</i> , 445 U.S. 74 (1980)	2, 17
<i>C.T. Hellmuth & Associates, Inc. v. WMATA</i> , 414 F. Supp. 408 (D. Md. 1976)	13
<i>Cardillo v. Liberty Mutual Ins. Co.</i> , 330 U.S. 469 (1947)	3
<i>Clark v. Monarch Engineering Co.</i> , 248 N.Y. 107, 161 N.E. 436 (1928)	4
<i>Del Re v. Prudential Lines, Inc.</i> , 669 F.2d 93 (2d Cir.), <i>cert. denied</i> , 103 S. Ct. 81 (1982)	17
<i>Director, OWCP v. National Van Lines, Inc.</i> , 613 F.2d 972 (D.C. Cir. 1979), <i>cert. denied</i> , 448 U.S. 907 (1980)	7, 13
<i>FAA Administrator v. Robertson</i> , 422 U.S. 255 (1975)	18
<i>Morton v. Mancari</i> , 417 U.S. 535 (1974)	18
<i>Potomac Electric Power Co. v. Director, OWCP</i> , 449 U.S. 268 (1980)	3
<i>Philbrook v. Glodgett</i> , 421 U.S. 707 (1975)	3
<i>Rodriguez v. Compass Shipping Co.</i> , 451 U.S. 596 (1981)	16, 17
<i>Rogers v. Lodge</i> , 458 U.S. 613 (1982)	12
<i>Russello v. United States</i> , 104 S. Ct. 296 (1983)....	8
<i>Seal v. Slattery Associates</i> , C.A. No. 83-0396 (D.D.C. filed Feb. 14, 1983)	13
<i>Smith v. Bechtel Associates Professional Corp.</i> , D.C., 466 A.2d 436 (D.C.), <i>cert. denied</i> , 104 S. Ct. 489 (1983)	13
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<i>United States v. Doe</i> , 104 S. Ct. 1237 (1984)	12
<i>WMATA v. Mergentime Corp.</i> , 626 F.2d 959 (D.C. Cir. 1980)	12, 13
<i>Williams v. WMATA</i> , No. 83-822 (Jan. 16, 1984)..	16

TABLE OF AUTHORITIES—Continued

Statutes and Regulations:	Page
Longshoremen's and Harbor Workers' Compensation Act (1976):	
33 U.S.C. § 904	<i>passim</i>
33 U.S.C. § 905	<i>passim</i>
33 U.S.C. § 907	2
33 U.S.C. § 908	2
33 U.S.C. § 909	2
33 U.S.C. § 914	2
33 U.S.C. § 918	2
33 U.S.C. § 921	2
33 U.S.C. § 933	9, 16
33 U.S.C. § 937	8
33 U.S.C. § 938	2
33 U.S.C. § 944	15
Washington Metropolitan Area Transit Authority Interstate Compact, Pub. L. No. 89-774, 80 Stat. 1324 (1966)	
§ 12	13, 19
§ 80	5, 6
Maryland Code Ann., art. 101, § 62 (Michie 1979) ..	19
New York Workmen's Compensation Act, 1922 N.Y. Laws, Ch. 615, § 56	4, 8
Virginia Code Ann., §§ 65.1-29 & -30 (1980)	19
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<i>Hearings on H.R. 247 et al. Before a Select Sub- comm. on Labor of the House Comm. on Educa- tion and Labor, 92d Cong., 2d Sess. (1972)</i>	17
Other Authorities:	
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Barrett, <i>Insurance for Urban Transportation Con- struction</i> , Report No. UMTA-MA-06-0025-77-13 (Dept. of Transp. 1977)	19
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TABLE OF AUTHORITIES—Continued

	Page
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A. Larson, <i>The Law of Workmen's Compensation</i> (1983)	<i>passim</i>
National Academy of Sciences, <i>Better Contracting for Underground Construction</i> , PB-236 973 (1974)	10, 11

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REPLY BRIEF

1. Respondents' chief argument is that WMATA is not entitled to immunity under Section 905 because that provision is limited to an "employer." In addition, respondents claim that any immunity to which WMATA is otherwise entitled should exclude liability for the acts of WMATA's agent, Bechtel. Neither claim is correct.

a. Respondents first contend (Resp. Br. 7-8) that the absence of the word "contractor" from Section 905 indicates that Congress intended only an immediate "employer" to receive immunity, and not a contractor who meets precisely the same duty.¹ Respondents have offered no reason why Congress would have intended such an arbitrary result, and there are compelling reasons demon-

¹ Respondents' argument presumably applies equally to a securing subcontractor that was not an immediate employer.

strating that this was clearly not Congress' intent. Indeed, respondents themselves concede—and contend—that the term “employer” used throughout the Act includes a “contractor” in some instances. Resp. Br. 31 n.40. Their position is that “employer” in Section 905(a) does *not* include a contractor, but that the same term when used in Sections 907-909 *does* include a contractor. *Id.* Respondents cannot have it both ways.

As we showed in our initial brief (Pet. Br. 30-33), if a “contractor” has no responsibilities or privileges under the LHWCA except where the word “contractor” appears, the statute's entire compensation system will come to a halt in any case where a “contractor” secured the compensation. Nowhere in the Act except Section 904 does the word “contractor” appear. But that section does *not* require the contractor to deliver the benefits it has secured; the pay-out sections are 907-909 and 914, and they speak only of an “employer[’s]” responsibilities. Hence, if, as respondents say, a securing contractor such as WMATA cannot be deemed to be an “employer” even though it has performed an employer's duties, WMATA should halt all compensation payments immediately.³ Congress surely could not have intended a construction that would so frustrate the Act's purpose.³

³ Under respondents' theory, if the general contractor and the subcontractor-employer both fail to secure compensation, only the subcontractor-employer would be held liable for civil and criminal sanctions under Sections 914(h) and 938, because only an “employer” is covered by those sections. Moreover, a contractor could not be sued by an employee for compensation (Sections 918(a) and 921(c)) and, if sued for negligence, would not lose any tort defenses (Section 905(a)), again because it is not an “employer.” Indeed, if respondents' construction of the statute is correct, a contractor can simply refuse to fulfill its responsibilities under Section 904(a) altogether with complete impunity. Such a contractor need never secure, and never pay, confident that there is no LHWCA enforcement power that applies to it.

³ *Bloomer v. Liberty Mut. Ins. Co.*, 445 U.S. 74, 85-86 (1980). As the Court has stated, “[i]n expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the

Respondents only answer to this is that "[o]bviously, the contractor would also be responsible for obeying other sections which relate to the payment of those benefits." Resp. Br. 31 n.40. Respondents never explain—because there is no explanation—why a contractor should "obviously" be treated as an "employer" under the pay-out sections but not the immunity section. There is simply no principled distinction between the two. We submit that WMATA is either an "employer" under all these sections, or an "employer" under none.

Furthermore, respondents' contention flies in the face of the *quid pro quo* theory upon which the LHWCA hinges, i.e., that tort immunity will be received in exchange for the guaranteeing of swift, sure delivery of compensation benefits.⁴ If WMATA had directly employed every Metro construction worker, and had insured all those workers pursuant to its Section 904 duty, there is no question that it would now be entitled to Section 905 immunity. It borders on the irrational to suppose that Congress intended a different result where WMATA engaged the same workers, met the same duty to cover those workers, but, instead, used subcontractors on the project for reasons wholly unrelated to the LHWCA.⁵

provisions of the whole law, and to its object and policy.'" *Philbrook v. Glodgett*, 421 U.S. 707, 713 (1975) (citation omitted).

⁴ *Potomac Elec. Power Co. v. Director, OWCP*, 449 U.S. 268, 281-282 (1980); *Cardillo v. Liberty Mut. Ins. Co.*, 330 U.S. 469, 476 (1947); 2A A. Larson, *The Law of Workmen's Compensation* § 65.11, at 12-1 to 12-6 (1983).

⁵ Respondents add, however, that "WMATA has, in effect * * * received a *quid pro quo* by virtue of its instruction to contractors to recognize that WMATA has purchased compensation insurance for them when submitting their bids." Resp. Br. 13. We assume this is not a serious argument that WMATA received the *quid pro quo* that Congress intended. Furthermore, the contention overlooks the fact that WMATA itself paid the full price for the compensation insurance. Finally, the *quid pro quo* invented by respondents is in any event a mirage. In practice, as respondents' own cited studies indicate (Resp. Br. 36 n.49, 37 n.51), subcontractors on wrap-up projects do not reduce their bids to recognize saved insurance

The purpose of Section 904 was to make sure that the "employer" duty to secure compensation was met, and to that end Congress placed that duty on contractors and subcontractors alike.⁶ Hence, the obvious reason that neither "contractor" nor "subcontractor" appears in Section 905 is that whichever one meets the "employer" duty imposed by Section 904 necessarily receives the "employer" immunity granted by Section 905. As Professor Larson has stated, "[s]ince the general contractor is * * * in effect made the employer for the purposes of the compensation statute, it is obvious that he should enjoy the regular immunity of an employer * * *."⁷

costs but include those costs in their bids anyway. *E.g.*, Ashley, *Preliminary Insurance Program Selection for Urban Mass Transit Project Construction* 11 (Dept. of Transp. 1981).

⁶ Respondents contend (Resp. Br. 9-15) that the New York law upon which the LHWCA was modeled supports their construction of Sections 904 and 905 because the language of the two laws is "very similar." In fact, the two laws are materially different. For present purposes (*see also* page 8 note 11, *infra*), the most significant difference is that, quite unlike Section 904, under New York law a contractor *had no duty to secure*. This difference between the two statutes is crucial, as the New York courts' own decisions make clear. *Sweezy v. Arc Elec. Constr. Co.*, 295 N.Y. 306, 67 N.E.2d 369, 371 (1946), held that a general contractor does not receive immunity precisely because a general contractor does *not* have the same duty as the subcontractor—i.e., because the contractor "is not bound to secure compensation as an employer" (emphasis in original). *See also Clark v. Monarch Eng'g Co.*, 248 N.Y. 107, 161 N.E. 436 (1928) (holding the difference between the contractor and subcontractor duties to be material, but not reaching the immunity issue). If anything, the New York law supports WMATA's position, not respondents'.

⁷ 2A A. Larson, *supra*, § 72.31(a), at 14-112 (emphasis added). Respondents would have this Court believe that the decided cases are contrary to Professor Larson's statement. Resp. Br. 27-29. But that is not so. The reason that "no appellate decision has found a general contractor to be immune under Section 905(a)" (Resp. Br. 27) is simply that *no decision* (including all those cited by respondents, pp. 27-29) has involved a contractor that met a duty to secure under Section 904. More importantly, *no case* has ever *denied* immunity under Section 905 on the ground advanced by

b. Respondents' second argument is that, even if WMATA is entitled to Section 905 immunity, the immunity should not extend to liability that WMATA might otherwise have for the acts of its agent, Bechtel. Resp. Br. 41-44. The sole basis for this contention is respondents' claim that WMATA would not be liable for Bechtel's actions under ordinary tort principles, but is liable *only* by virtue of Section 80 of the WMATA Compact.⁸ Hence, say respondents, it is unfair to cloak WMATA's special Section 80 liability with Section 905 immunity. This contention is completely unsound for three separate reasons.

First, respondents' argument is directly contrary to the plain language of the LHWCA. Section 905(a) makes an employer's compensation liability "exclusive and in place of *all other liability of such employer to the employee* * * * on account of such injury or death * * *" (emphasis added). No exception is made to this immunity where the employer's potential tort liability happens to be due to its agent's acts, just as no exception is made to an employer's obligation to pay compensation where the cause of injury is due to the agent's acts.

Moreover, respondents' argument rests upon an erroneous premise—that but for Compact Section 80, WMATA would not be liable for Bechtel's torts (because, according to respondents, Bechtel is an independent con-

respondents here—that a "contractor" cannot receive "employer" immunity. Indeed, as Professor Larson has catalogued, "the great majority" of state courts specifically recognize the principle that a party required by statute to take on "employer" duties necessarily becomes a "statutory employer" for all other workmen's compensation purposes, including the receipt of "employer" immunity. *Id.* That is the principle presented here. Far from being the unprecedented step respondents imply, recognizing that WMATA acted as a "statutory employer" in this case would be well within the mainstream of decided case law.

⁸ Section 80 provides in pertinent part: "The Authority [WMATA] shall be liable * * * for its torts and those of its * * * agent * * * in accordance with the law of the applicable signatory * * *."

tractor and not an agent under District of Columbia tort law). But as the Court of Appeals recognized, WMATA *would* be liable under District of Columbia tort law for Bechtel's torts *regardless* of whether Bechtel was an independent contractor or an agent, because WMATA had a nondelegable duty "to protect workers from physical harm caused by the construction of Metro." Pet. App. 45a n.6. Hence, WMATA's liability for Bechtel's torts is in fact based on local tort law, not Section 80, and, as respondents concede (Resp. Br. 43), such tort liability is indeed immunized by LHWCA Section 905(a).

Finally, even if respondents were correct that WMATA would not be liable for Bechtel's torts under local tort law, *that* would be the reason respondents could not recover from WMATA for Bechtel's negligence; WMATA's Section 905 immunity would in that case be irrelevant. Section 80 of the Compact simply renders WMATA *amenable* to suit for Bechtel's torts by providing for a limited waiver of sovereign immunity; it does not of its own force render WMATA *liable* for anything. To the contrary, Section 80 expressly incorporates local tort law (page 5 note 8, *supra*), which, according to respondents, would exonerate WMATA for Bechtel's torts. Under respondents' own theory, therefore, they could not recover from WMATA for Bechtel's negligence at all—whether or not WMATA is entitled to immunity under Section 905.

2. LHWCA Section 904 makes plain that a contractor cannot avoid its "employer" duties under the LHWCA by the simple device of subcontracting its work. Even though the contractor carries out its work through its subcontractor's employees, under Section 904 the contractor still has its duty to secure compensation payment for those employees, and is not relieved of that duty "unless the subcontractor has secured such payment" already.⁹ That is the duty WMATA unquestionably met in this case.

⁹ It is clear that the purpose of this provision is to guard against an employer subcontracting to irresponsible firms who then fail

Respondents do not dispute that WMATA secured their compensation and did so at a time when its subcontractors had not secured.¹⁰ Neither do they defend the Court of Appeals' view that WMATA could not legitimately secure until it had "first require[d] its subcontractors to purchase the insurance." Pet. App. 54a (emphasis in original). Instead, respondents assert that WMATA simply had no duty to secure their compensation, and, hence, that the benefits they have re-

to provide coverage for their employees. *E.g.*, *Director, OWCP v. National Van Lines, Inc.*, 618 F.2d 972, 986 (D.C. Cir. 1979), *cert. denied*, 448 U.S. 907 (1980); 1C A. Larson, *supra*, § 49.11, at 9-14 to 9-16.

¹⁰ Respondents do complain, however, that a subcontractor who loses "the race" to secure compensation will fail to "win" immunity and be "in default of his statutory obligation." Resp. Br. 16-17. This is inaccurate on several counts. First, as we explained in our initial brief (Pet. Br. 29-30 n.41)—and as respondents do not dispute—securing compensation is not a "win"; WMATA has spent over \$175 million since 1971 to secure compensation for its subcontractors' employees. Thus, the "prize" of immunity came dear, considering that it could in substance have been purchased for far less through the simple device of liability insurance.

Second, any WMATA subcontractor who wanted to "win" the race to secure has always had that opportunity. Every subcontractor has had (and has now) the option to purchase compensation insurance for its employees. J.A. 104. Had any individual subcontractor done so, however, WMATA would not have removed wrap-up coverage for that subcontractor's employees; instead, WMATA would have maintained that coverage to ensure that those employees would be protected in the event the subcontractor's individual insurance failed. And, so long as the subcontractor's insurance was maintained, WMATA would have achieved cost savings because its wrap-up premiums are based on loss claims filed against WMATA's policy. J.A. 88-92.

Finally, no subcontractor was placed "in default" of its own Section 904 duty when WMATA secured compensation. Although both WMATA and its subcontractors had the duty to ensure that compensation was secured, satisfaction of that duty by either party relieved the other of any need to purchase duplicative insurance. Congress obviously did not intend the wastefulness of both actually purchasing insurance coverage.

ceived from WMATA must be adjudged a *volunteered* windfall.¹¹

a. Respondents first contend that WMATA purchased its wrap-up policy to meet its subcontractors' Section

¹¹ As a preliminary matter, respondents extensively argue that WMATA had a "secondary" rather than a "primary" duty to secure compensation. Resp. Br. 15-18. This issue is immaterial. Even if WMATA's duty were only "secondary" (in the sense that WMATA had no duty "unless the subcontractors ha[d] [not] secured"), here that duty was triggered. Moreover, it is difficult to see how this issue is pertinent even to respondents' position, since their view is either that WMATA *never* had *any* duty under the statute (primary, secondary, or otherwise), or, if it had one, that it *never* intended to meet that duty. Resp. Br. 19-22.

Nevertheless, even if the "primary-secondary" issue were relevant, the three authorities relied on by respondents prove, if anything, that Congress intended WMATA to have the "primary" duty. Respondents first refer to a bill offered by Senator Prouty in 1971. The bill would have granted *immunity to vessel owners*—which has absolutely nothing to do with *land-based contractor duties*—and in any event the bill died in Committee.

Second, respondents cite Section 56 of the New York workmen's compensation law. That section makes a subcontractor "primarily liable" for workmen's compensation benefits and places on the *subcontractor alone* the duty to *secure* such compensation; the sole responsibility of a contractor under the section is "to pay" compensation to any injured employer in any case where the subcontractor has failed in its duty. In Section 904, however, Congress omitted the language making subcontractors "primarily liable"; in addition, it placed the duty to secure on the *contractor*, a duty that can be relieved only if the subcontractor has itself secured.

Finally, respondents cite Section 937 of the LHWCA. That section expressly prohibits a vessel owner from hiring a stevedoring firm unless the stevedore first presents proof to the vessel that it has in fact already secured compensation for its employees. However, this section proves our point—that when Congress *intended* to place a "primary" duty on a party, it knew how to do so; the fact that it did so in Section 937 for stevedoring firms, but did not do so in Section 904 for similarly situated land-based subcontractors, shows that no such "primary" duty was intended for land-based subcontractors. See *Russello v. United States*, 104 S. Ct. 296, 300 (1983).

904 duty, rather than its own.”¹² Resp. Br. 19. This is incorrect.¹³ WMATA’s Secretary and Director of its insurance program (J.A. 231) offered unrefuted testimony¹⁴ that WMATA adopted the program expressly

¹² Respondents also take the remarkable position that a contractor has no duty under Section 904 to the employees of any subcontractors “with whom it is not in a contractual relationship.” Resp. Br. 21 n.24. In other words, respondents believe a contractor may avoid all responsibilities under the Act by having its subcontractors delegate work to subcontractors of their own. This is plainly contrary to the language and purpose of Section 904.

¹³ It was precisely due to WMATA’s statutory responsibility that WMATA’s wrap-up policy *had* to name as insureds all WMATA’s subcontractors and sub-subcontractors; i.e., the reason was to identify which employer’s employees were covered by the policy. Contrary to respondents’ and amici subcontractors’ arguments (Resp. Br. 19-20; Amici Br. 5-6), WMATA was obliged to name these subcontractors as insureds in order to meet its own Section 904 duty. (Amici subcontractors are only seven of the over 3100 Phase II subcontractors of various tiers involved in Metro construction.) The reason WMATA acquired compensation insurance and certificates of insurance “for the benefit” and “on behalf of” its subcontractors’ employees was that it was *WMATA’s duty* to do so under Section 904, and it could meet its own Section 904 duty in no other way than it did in this case.

In an effort to persuade the Court that WMATA secured not for itself but for them, the amici subcontractors misrepresent the record. They contend that “[a]t no time was WMATA a named insured for workers’ compensation.” Amici Br. 5. This is both untrue (J.A. 127, 130, 225) and unimportant. The important “insureds” here are not WMATA or its subcontractors, but those subcontractors’ employees. It was those employees that WMATA undisputably insured pursuant to its Section 904 duty.

¹⁴ Further evidence demonstrating the unsoundness of respondents’ claim lies in Section 933 of the LHWCA. Had WMATA intended to meet only its subcontractors’ duty to secure and not its own, it must also have intended that its subcontractors would succeed to all WMATA’s assignment rights under Section 933. Under that section, the securing employer succeeds to the injured employee’s third-party rights, and, upon recovery against such third party, the securing employer recovers “all amounts paid as compensation” plus 20% of any recovery above that amount. Section 933(e)(1)(c) and (2). It is nonsense to suppose that WMATA

to meet its Section 904 duty (J.A. 263-265, 297-299).¹⁶

b. Respondents next argue that permitting a contractor such as WMATA to secure compensation will threaten "[t]he desire of Congress to promote a safe workplace." Resp. Br. 23. Specifically, respondents contend that "statutory immunity should be denied" WMATA in order to ensure that the "direct employer" will in all cases "bear the cost of unsafe [work] conditions" by itself making premium payments. Resp. Br. 22-23. But it cannot be legitimately claimed—as respondents apparently do—that Congress *never* intended a contractor to purchase compensation insurance because doing so threatens the safety incentives of "direct employers." If that were so, Section 904 would not require contractors in some cases to secure. Moreover, the contention that WMATA's purchase of insurance premiums undermined job safety is directly contrary to the facts. See Pet. Br. 41-42 & nn.61-63. Through its Coordinated Safety Program¹⁶ and

would have wanted to confer such a windfall upon subcontractors who had not paid one cent in insurance premiums.

¹⁵ Although we assume the subcontractors' duty to secure was relieved by WMATA's satisfaction of its own duty to secure, it does not follow that the subcontractors are necessarily entitled to immunity along with WMATA. Amici subcontractors contend that this Court should decide that issue in this case. But these amici are worried about the next case, not this one. The issue whether they secured and are entitled to immunity was reserved by the Court of Appeals (Pet. App. 56a n.16) and is not necessary to the decision here. The only questions here are whether WMATA had a duty to secure, and, if so, whether it is entitled to immunity. Whether or not this Court agrees with WMATA on these two questions, there will be time enough in the cases that have been filed against the amici for the issue of their immunity to be decided on a full record. (Indeed, one of amici's primary complaints (Amici Br. 2-3) is that, not being parties below, they have not yet had a chance to make a record on this issue.)

¹⁶ J.A. 132-161. A primary objective and advantage of wrap-up insurance programs is that they allow and encourage the implementation of a *coordinated safety program*, administered by one general contractor, one insurance carrier, and one claims-handling and loss-control firm. National Academy of Sciences, *Better Con-*

its system of monetary incentives for subcontractors with accident-free workplaces,¹⁷ WMATA has achieved an unmatched safety record on the Metro project.¹⁸ Hence, respondents' argument that safety concerns should require a wholesale revision of Section 904 is completely without foundation.¹⁹

c. Finally, respondents contend that WMATA is not a "contractor" at all within the meaning of Section 904, and therefore had no duty to secure compensation. Resp. Br. 23-27. This contention was rejected out of hand by the courts below. The District Court found that "WMATA clearly fulfills the function of overall general contractor of the rapid transit system" (Pet. App.

tracting for Underground Construction 36 (1974); General Services Administration, *Wrap-Up Study* 3, 12 (August 22, 1975). In fact, the job-safety advantages offered by wrap-up programs are considered a *better* justification for its implementation than possible cost savings, since those savings will not occur if safety and loss control are not achieved. GSA, *supra*, at 16.

¹⁷ Although respondents object to our reference to WMATA's Safety Award Program, respondents themselves introduced the Coordinated Safety Program as part of their deposition of WMATA Secretary Del Ison, but failed to include the component Safety Award Program which was then, and is now, in force. In any event, the effectiveness of WMATA's Safety Award Program is documented in a study respondents rely on themselves. Ashley, *supra*, app. B, at B2-B3.

¹⁸ It may well be that this safety record is, as respondents say, directly related to the payment of insurance premiums. Since WMATA itself pays the premiums for the whole project, and since those premiums are themselves directly premised on the dollar amount of incurred losses, WMATA plainly had the incentive to produce the fine safety record that has in practice resulted. J.A. 88-91.

¹⁹ Respondents may intend their safety concerns to be considered *only* in a case where the securing contractor is otherwise deemed to be a "volunteer." Resp. Br. 22-23. If so, respondents presumably wish their argument disregarded unless the Court first accepts their view that WMATA "voluntarily" intended to meet only its subcontractors' duty. As we have already shown (pages 9-10, *supra*), WMATA was not such a "volunteer," but intended through the wrap-up program to meet its own Section 904 duty.

28a),²⁰ and the Court of Appeals acknowledged that "WMATA exercises the ultimate control of and authority for the construction * * * of the subway system." *Id.* at 42a; *see also id.* at 52a-55a. Nothing in respondents' arguments shows that these factual findings should now be overturned.²¹

First, WMATA fits comfortably within the definition of "contractor" offered by respondents, as the record and the findings below make clear.²² Second, respondents' contention that WMATA has sometimes referred to itself in other terms,²³ *e.g.*, as "WMATA" or the "Authority,"²⁴ is of no moment; what matters is that WMATA

²⁰ *Accord*, Pet. App. 1a, 2a, 3a, 7a, 10a, 14a, 24a, 32a-36a.

²¹ The District Court's findings were left undisturbed by the Court of Appeals, which necessarily rejected respondents' arguments. *See* Pet. Br. 21 n.28. This Court has frequently noted its reluctance to disturb findings of fact concurred in by two lower courts, and should refuse to do so in this case. *United States v. Doe*, 104 S. Ct. 1237, 1243 (1984); *Rogers v. Lodge*, 458 U.S. 613, 623 (1982).

²² Respondents cite R. Clough, *Construction Contracting* 3 (4th ed. 1981) for the proposition that a prime or general contractor is one "in contract with the owner for the construction of the project, either in its entirety or for some specialized portion thereof." Resp. Br. 24. The same reference also states that such a contractor is one "who brings together * * * the construction process into a single, coordinated effort" and does so through "close management control." Clough, *supra*, at 3-4. There is no doubt on this record that WMATA performed precisely these tasks. Through its Department of Design and Construction and its agent, Bechtel, WMATA supervises, controls, and monitors all work performed by its numerous subcontractors, coordinating their respective responsibilities for distinct portions of the WMATA system. J.A. 163-184, 276-280. And it alone is responsible for the construction of the entire project.

²³ In addition, respondents refer to certain contracts in which parties to whom WMATA subcontracted discrete portions of the project were themselves called "contractors." But this hardly makes WMATA itself any less an overall general contractor. Moreover, the referenced "contractors" had limited and subordinate roles at their particular construction sites, as the record demonstrates. *See, e.g.*, J.A. 192-193, 212-214.

²⁴ Respondents also cite *WMATA v. Mergentime Corp.*, 626 F.2d 959 (D.C. Cir. 1980), for the proposition that "[t]he judiciary has

performed the role of a "contractor" within the purposes of Section 904,²⁵ not the particular *labels* that may have been used by WMATA or other parties for different purposes. Moreover, respondents themselves have characterized WMATA as the "general contractor" on the Metro system in their Brief in Opposition before this Court, in an appellate brief filed in the District of Columbia Court of Appeals, and in several federal District Court complaints in cases similar to these.²⁶ Third, respondents' contention that "WMATA cannot be considered a contractor [because] it does not have a contractual obligation" (Resp. Br. 25) is simply not so.²⁷ WMATA has a contractual obligation to build a rapid transit system pursuant to the WMATA Compact.²⁸ Finally, respondents' reliance on Professor Larson's treatise for the proposition that the purposes of the LHWCA "are not served by imposing * * * compensation liability on entities such as WMATA" (Resp. Br. 24, 27) is completely unfounded.

* * * recognized that WMATA is an owner." Resp. Br. 25 n.30. This mischaracterizes the cited case. *Mergentime* involved a contract dispute in which the court, solely for convenience, adopted the "owner" and "contractor" labels used by the parties to the contract. The court made no legal or factual determination that WMATA was an "owner" even for purposes of that case, much less for purposes of the LHWCA.

²⁵ See *Director, OWCP v. National Van Lines, Inc.*, 613 F.2d at 986.

²⁶ Respondents' Brief in Opposition, at i, 3, 9; Brief of Appellant at 21 & 22 n.2, *Smith v. Bechtel Assoc. Prof. Corp.*, D.C., 466 A.2d 436 (D.C.), cert. denied, 104 S. Ct. 489 (1983); and, e.g., Complaint in *Seal v. Slattery Assoc.*, C.A. No. 83-0396 (D.D.C. filed Feb. 14, 1983).

²⁷ In *Director, OWCP v. National Van Lines, Inc.*, the court formulated a two-part test holding that an employer is a Section 904 "contractor" if it (1) has a contractual obligation and (2) contracts out part of that obligation to a subcontractor. 613 F.2d at 987.

²⁸ The WMATA Compact is not only a law, but also a contract among the District of Columbia, Maryland, and Virginia. *C. T. Hellmuth & Assoc., Inc. v. WMATA*, 414 F. Supp. 408, 409 (D. Md. 1976). Section 12 of the Compact delegated to WMATA the power and contractual duty to construct a rapid transit system for those three sovereign signatories.

In fact, Professor Larson's treatise makes precisely the opposite point—that the term “contractor” has been given a broad construction in order to “maximize the protective reach of the statute.”²⁹ Based on the foregoing, it is apparent why all the lower courts gave this claim summary treatment.³⁰

3. In our initial brief, we contended that denying immunity to a securing contractor such as WMATA would undermine the three purposes of the LHWCA—guaranteed worker coverage, swift delivery of benefits, and avoidance of litigation—as well as other congressional purposes. Respondents either ignore this contention or, where they address it, they ignore the record before this Court.

a. Respondents offer two contradictory answers to our contention that denying immunity to a securing contractor such as WMATA risks gaps in worker coverage. They first say that WMATA need not have attempted to cover all its workers. Instead, they argue, “[i]t would not seem impractical for WMATA to send a

²⁹ 1C A. Larson, *supra*, § 49.11, at 9-10. Moreover, WMATA fulfills any generalized test derived from Professor Larson's treatise. As he states, the central question in determining “contractor” status is whether the subcontracted work is part of the regular business of the asserted contractor. *Id.* § 49.12, at 9-16. The respondents have not and cannot refute that WMATA's purpose, function, and business is to construct and operate a rapid transit system. The subcontracts let by WMATA are obviously in furtherance of that purpose. Furthermore, any status that WMATA may have as an “owner” in addition to its position as overall general “contractor” does not affect its immunity under the Act. 2A, *id.*, § 72.82, at 14-234 to 14-238.

³⁰ Inasmuch as respondents claim that the policies of the LHWCA are not served by treating WMATA as a “contractor” under that Act, one further point should be made. WMATA, and others like it, would like nothing better than to avoid all workers' compensation obligations through the simple mechanism of declaring itself an “owner.” Had it known it could do that, it could have saved over \$175 million in premium payments. If the Court now declares WMATA an “owner,” it can stop paying premiums immediately. If that happens, respondents may be winners, but many, many other workers will clearly be losers.

simple form letter to each of its 'subcontractors,' " asking that they keep WMATA posted concerning which workers were covered. Resp. Br. 30. This simplistic suggestion is made as if there were no record in this case, and as if the Court of Appeals had not denied WMATA immunity.

The sworn testimony of WMATA's Secretary—a witness deposed by respondents, a witness in the best position to know the facts, and the only witness offering record evidence on the issue—was that, as demonstrated during Phase I of Metro's construction, no practical means were available for ensuring that all subcontractors (of whatever tier) would in fact keep WMATA informed concerning employee coverage. J.A. 263, 284-285. In the far more complex Phase II construction, when there were over 3,100 such subcontractors, what had been a difficult problem of ensuring coverage became an impossible one. The considered judgment of those who were required to confront the issue was that continuous coverage for every employee could be ensured only through WMATA's purchase of a single wrap-up policy. Respondents, who had full opportunity to question WMATA's Secretary or present any other evidence of their own, now purport to deal with the issue by saying "a simple form letter" could have been written. Moreover, respondents' position completely overlooks the fact that if WMATA is denied immunity, then it will have no incentive to ensure coverage at all, whether by wrap-up insurance, a "simple form letter," or otherwise.⁸¹

⁸¹ Respondents also contend that WMATA's concern with subcontractor gaps in coverage is in any event misplaced since injured employees may always seek relief directly from their employer or from the "special fund" established under Section 944 of the LHWCA. Resp. Br. 21 n.23. But these alternatives were of course intended by Congress to be *last resorts* for injured employees; the first resort was mandated by Congress in the requirements of Section 904. As the Court of Appeals itself recognized: "The Act is designed to insure that all employees are covered by worker's compensation insurance and will thereby receive prompt compensation for work-related injuries." Pet. App. 51a-52a.

Respondents' second answer to the threatened gaps in employee coverage contradicts their first. "[A] contractor[s] * * * purchase [of] insurance in advance to protect against subcontractor default," say respondents, "would be the only rational thing to do." Resp. Br. 31. They then describe a particular kind of policy which they claim would provide the necessary coverage. *Id.* But if WMATA and similarly-situated contractors receive no immunity for securing coverage, the incentive to ensure that coverage (whether through wrap-up or respondents' proposed policy) is gone.³²

b. Respondents ignore our contention (Pet. Br. 35-36) that requiring a securing contractor to answer in tort will create incentives for that contractor to resist paying compensation benefits—thereby undermining swift, sure delivery of those benefits. Respondents simply claim that it is wrap-up insurance that causes this result. Resp. Br. 32. That is not so. The result is caused by imposing tort liability on the same party providing compensation benefits, no matter what kind of coverage that party has. The premise of the LHWCA is that such a party may be confident of its immunity, and therefore would have no reason to resist swift delivery of benefits. The premise of the Court of Appeals' decision is otherwise.³³

³² Respondents also offer the circular contention that since the policy they propose was written to conform to "most workers' compensation laws," general contractors do not need immunity as "an additional incentive" to purchase such a policy. Resp. Br. 31-32. The answer, of course, is that such "workers' compensation laws" place a *duty* on the contractor to acquire the policy and *grant it immunity* for doing so. See 2A A. Larson, *supra*, § 72.31(a) (noting the "majority rule" provides immunity to securing contractors).

³³ Respondents contend that wrap-up insurance provides an incentive for a Section 933(b) statutory assignee not to pursue a third-party action against another party covered by the same insurance. This purported "conflict" issue has nothing to do with WMATA's contention regarding delayed compensation benefits; moreover, it was directly rejected by the Court of Appeals (Pet. App. 60a-64a), and this Court in turn denied review. *Williams v. WMATA*, No. 83-822, *cert. denied* (Jan. 16, 1984). See also *Rodriguez v. Compass Shipping Co.*, 451 U.S. 596 (1981).

c. In answer to our contention (Pet. Br. 36-39) that denying immunity to securing contractors will induce the very litigation the LHWCA was designed to avoid, respondents make essentially two points: (1) that third-party actions are permitted by the Act; and (2) that the induced litigation may not be as "massive" as we suggest. Resp. Br. 33-35. The first point is true, but irrelevant. Our contention is not that all third-party actions should be prohibited; rather, we claim only that third-party actions against the compensation provider itself were never contemplated by Congress. It is clear that "one of the purposes of the Act is to minimize the need for litigation"³⁴ and that the Court of Appeals' decision will encourage that litigation. It will do so primarily by inducing litigation between tiered employers as they seek to pass on their liability. Respondents do not deny that this litigation will be encouraged or that the primary gain will be to attorneys, not workers.³⁵ Their only answer is that we may have overstated how great the litigation boom will be.³⁶ This, we submit, is no answer at all.

³⁴ *Rodriguez*, 451 U.S. at 616; *Bloomer*, 415 U.S. at 86.

³⁵ Respondents' only answer to our statement that the induced litigation will primarily benefit attorneys is that the statement is "entirely extra-legal." Resp. Br. 35 n.48. This of course is not so. The truth of the statement has been expressly recognized by Congress, this Court, and the lower courts. See, e.g., *Hearings on H.R. 247 et al., Before a Select Subcomm. on Labor of the House Comm. on Education and Labor*, 92 Cong., 2d Sess. 106 (1972); *Bloomer*, 445 U.S. at 83-86; *Del Re v. Prudential Lines, Inc.*, 669 F.2d 93, 97 (2d Cir.), cert. denied, 103 S. Ct. 81 (1982).

³⁶ For example, regarding the inevitable indemnity suits, respondents do not deny that they will occur; they merely express the hope that some court may at some point prevent them. Resp. Br. 35 & n.46. Similarly, regarding the considerable number of suits that will result from this case alone, respondents say only that the rate at which this litigation is burgeoning may have slowed. Resp. Br. 35 n.47. As to this, WMATA notes that respondents' counsel (Ashcraft & Gerel) have filed all but a few of the 110 suits resulting thus far, and that they control the rate at which that number will grow.

d. Respondents assert that this Court may not even consider the ways in which the decision below transgresses congressional intent, if those transgressions do not "reflect palpably on Congress' intent in enacting the LHWCA." Resp. Br. 36. This is not correct. This Court has repeatedly made clear that different congressional actions should be construed to harmonize, rather than conflict with one another.³⁷ The LHWCA should be construed, if possible, not to undercut other congressional purposes. As we showed in our initial brief (Pet. Br. 39-46), the decision below undercuts three other congressional purposes by (1) undermining the congressionally-endorsed wrap-up insurance program; (2) promoting divergent results within the States of the Metro system—which respondents expressly concede to be contrary to Congress' purpose (Resp. Br. 39); and (3) reducing the number of minority participants in federally-funded programs—which, again, respondents concede to be contrary to federal goals (Resp. Br. 41). Other than asking the Court to ignore these results (Resp. Br. 36, 38, 39, 41), respondents have little to say.

Respondents speculate that the wrap-up program will end "only if it is determined by Congress, the District of Columbia government, or the courts that the plan violates public policy * * * [or] that it does not satisfy the employer's duty under Section 904(a)." Resp. Br. 37. But the Court of Appeals' decision clearly holds that the wrap-up plan does not satisfy WMATA's Section 904(a) duty, and the undisputed testimony of WMATA's Secretary was that the program was instituted to meet that very duty. J.A. 263-265, 299. Furthermore, it is unreasonable to anticipate that the governments involved will continue the wrap-up program if there is no duty to do so and if the compensation provided by the program serves to fund subsequent tort suits against WMATA.³⁸ These governments can hardly

³⁷ See *FAA Adm'r v. Robertson*, 422 U.S. 255, 266 (1975); *Morton v. Mancari*, 417 U.S. 535, 551 (1974).

³⁸ Respondents also speculate that the expectation of *quid pro quo* immunity could not have been a factor in the implementation of

be expected to continue to fund an expensive "voluntary" program from which WMATA receives no benefit. Finally, it is unrealistic to suppose that carriers will continue underwriting wrap-up policies when a primary advantage of such policies—ending indemnification suits among co-insureds (Pet. Br. 39-40 n.56)—has been eliminated.

Respondents next argue that the Court of Appeals' decision will not produce divergent results within the Metro system, since the workers' compensation laws of Virginia and Maryland would deny WMATA immunity. Resp. Br. 38-39. Respondents' entire argument is based on the claim that WMATA is not in the "construction business," even though it is empowered under Section 12 of the WMATA Compact to construct the Metro system and, in fact, performs that role as a general contractor.³⁹ In essence, respondents simply reiterate their erroneous argument that WMATA is not a general contractor.⁴⁰

the wrap-up program. Resp. Br. 36. This argument supposes complete ignorance of workmen's compensation laws on the part of WMATA officials, i.e., that they thought the traditional *quid pro quo* would not follow their \$175 million decision to meet their Section 904 duty. Moreover, the studies cited by respondents provide no support whatever for their surmise (*id.* at n.49); indeed, one of those studies expressly deals with the "problem" of "third party" suits, and does not even mention the possibility that the compensation provider might itself be considered a third party. Instead, the report contemplates, as would be expected, that such provider would receive immunity. Barrett, *Insurance for Urban Transportation Construction*, Report No. UMTA-MA-06-0025-77-13, at 4-9 (Dept. of Transp. 1977).

³⁹ Virginia provides immunity for a securing contractor when its subcontractor performs the contractor's "business or occupation." Va. Code Ann. §§ 65.1-29, 65.1-30 (1980). WMATA's "business or occupation" is to construct Metro. *Anderson v. Thorington Constr. Co.*, 201 Va. 266, 110 S.E.2d 396 (1959), *appeal dismissed*, 363 U.S. 719 (1960) (Turnpike Authority empowered to construct and operate turnpike project is a statutory employer of subcontractors engaged to construct the turnpike). Similarly, Maryland provides immunity to a principal contractor who has subcontracted out part of its business or occupation. Md. Code Ann., art. 101, § 62 (Michie 1979). See generally Va.-Md. Br. 4-5 & n.2.

⁴⁰ See discussion at pp. 12-14, *supra*.

Finally, respondents concede that a "primary positive effec[t]" of WMATA's wrap-up insurance is that it increases minority participation, a result respondents admit is in furtherance of an important federal goal. Resp. Br. 40-41. Respondents argue, however, that this policy goal should be ignored and that there is in any event a trade-off between job safety and meeting "affirmative action goals." Resp. Br. 41.⁴¹ This contention is unresponsive, unfair, and incorrect.⁴²

The judgment below should be reversed.

Respectfully submitted,

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⁴¹ Respondents also assert that minority contractors can obtain "assigned-risk" policies at "competitive rates." Resp. Br. 40-41 n.57. If they mean by this that such policies can be obtained at rates equal to those available to established firms, this of course is not true. Assigned-risk policies typically include a substantial surcharge and, while there may be a ceiling for such rates, they will unquestionably be greater than those charged more established firms with known loss records.

⁴² Respondents erroneously contend that there are "inherent safety risks" in engaging minority businesses. Resp. Br. 41. It is primarily the fact that minority contractors are relatively new concerns without established loss records that causes their increased premiums (Pet. Br. 45); experience has proven that some of WMATA's minority contractors have excellent safety records.

No. 83-747

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1983

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY,
Petitioner,

v.

PAUL D. JOHNSON, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals
for the District of Columbia Circuit

**BRIEF *AMICUS CURIAE* OF ALLIANCE OF
AMERICAN INSURERS IN SUPPORT OF PETITIONER**

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
STATEMENT OF INTEREST OF <i>AMICUS CURIAE</i> , THE ALLIANCE OF AMERICAN INSURERS.....	1
SUMMARY OF ARGUMENT	2
ARGUMENT	4
I. WMATA IS AN EMPLOYER WITHIN THE MEANING OF § 904(a)	4
II. THE COST TO THE WORKERS' COMPENSA- TION SYSTEM	5
III. THE JUDICIAL SYSTEM IS THE LOSER.....	9
IV. THE ATTORNEYS ARE THE WINNERS.....	12
CONCLUSION	16

TABLE OF AUTHORITIES

CASES:	Page
<i>Bloomer v. Liberty Mutual Insurance Company</i> , 445 US 74 (1980)	12, 14
<i>Edmunds v. Compagnie Generale Transatlantique</i> , 443 US 256 (1979), reh. den., 444 US 889	13
<i>Hensley v. Washington Metropolitan Area Transit Authority</i> , 690 F.2d 1054 (D.C. Cir.—1982), cert. den., 102 S.Ct. 1749 (1982)	13
<i>Johnson v. Sioux City & New Orleans Barge Lines</i> , 629 F.2d 1244 (7th Cir.—1980), cert. den., 101 S.Ct. 408 (1980)	14
<i>National Steel and Shipbuilding Co. v. U.S. De- partment of Labor, Office of Workers' Compens- ation Programs</i> , 606 F.2d 875 (9th Cir.—1979) ..	13
<i>Northeast Marine Terminals v. Caputo</i> , 432 US 249 (1977)	10, 11
<i>Turner v. Transportacion Maritime Mexicana, S.A.</i> , 44 FRD 412 (USDC, Ed. Pa.—1968)	10, 11, 12

STATUTES:

Longshoremen's and Harbor Workers' Compensa- tion Act (LHWCA), 33 USC § 901 <i>et seq.</i>	<i>passim</i>
§ 904	<i>passim</i>
§ 907	4
§ 908	4
§ 909	4
§ 928	13
§ 932	4
§ 933	14
District of Columbia Workers' Compensation Act, D.C. Code § 36-501 <i>et seq.</i>	4

LEGISLATIVE:

Senate Report No. 92-1125, Senate Committee on Labor and Public Welfare, 92nd Congress, 2d Session	11
--	----

TABLE OF AUTHORITIES—Continued

	Page
Oversight Hearings on the Longshoremen's and Harbor Workers' Compensation Act, Subcommittee on Compensation, Health and Safety, Committee on Education and Labor, House of Representatives, Ninety-Fifth Congress, First Session, Vol. 1	8, 9
Oversight Hearings on the Longshoremen's and Harbor Workers' Compensation Act, Subcommittee on Labor Standards, Committee on Education and Labor, House of Representatives, Ninety-Sixth Congress, First Session	6, 7, 8
 OTHER:	
<i>Best's Review</i> , Property/Casualty Insurance Journal, January 1984	15
<i>Longshore Desk Book</i> , U.S. Department of Labor, Vol. A BRBS. 6-1, <i>et seq.</i>	13
20 CFR § 702.132-702.135	13

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**BRIEF AMICUS CURIAE OF ALLIANCE OF
AMERICAN INSURERS IN SUPPORT OF PETITIONER**

**THE INTEREST OF AMICUS CURIAE,
THE ALLIANCE OF AMERICAN INSURERS**

Pursuant to Rule 36 of the Revised Rules of the Supreme Court of the United States, and with the written consent of the parties to this proceeding, the Alliance of American Insurers files this brief *amicus curiae* in support of the petitioner, Washington Metropolitan Area Transit Authority (WMATA).

The Alliance of American Insurers is an association of 170 insurance companies whose members write property and casualty insurance, including employers' miscellaneous or general liability, throughout the United States. In 1982, the total direct premiums written by Alliance member companies for all lines of insurance was \$12,572,609,164.00 representing 12.32% of the total

market. In 1982, the total direct premiums written by Alliance companies for workers' compensation insurance on a country-wide basis for state law mandated workers' compensation and the federal Longshoremen's and Harbor Workers' Compensation Act was \$3,484,407,997.00 representing 22.63% of all such insurance.

As insurers, Alliance member companies have a direct interest in the judicial interpretations of the laws which they must underwrite and the impact that such interpretations will have on the workers' compensation system. We believe that the decision of the Court below, unless reversed, will have a significant and substantially adverse impact on both the workers' compensation system and the judiciary which must be brought to this Court's attention.

SUMMARY OF ARGUMENT

Contrary to the opinion of the Court below, *amicus curiae* submits that § 904(a) of the Act clearly requires WMATA—the general contractor—to secure the payment of workers' compensation. It may do so by purchasing insurance or by forming an approved self-insurance program. WMATA purchased wrap-up insurance on behalf of itself and all subcontractors. Only in those instances when the subcontractor already has undertaken that obligation for its own employees is the general contractor excused from its obligation to do so, and then only as to the employees of that particular subcontractor. None of WMATA's subcontractors secured the payment of compensation for employees working on the WMATA Metro construction project which is the subject of this proceeding.

Amicus curiae submits that the Court below improperly denied to WMATA the right of exclusivity of remedy which the LHWCA affords to other employers subject to the Act. The social costs that will accrue if the

decision below is not reversed are more than the workers' compensation system can bear. The decision will spawn a flood of litigation which greatly will exacerbate the problems of an already overburdened judicial system—third party negligence actions against the compensation providing employer. The primary beneficiaries of such suits will be attorneys. The injured worker has at best a minimal chance of gaining anything above the compensation paid by the employer.

Congress, after hearing the complaints of the judiciary, employers and insurance carriers about such actions, recognized that the main beneficiaries were a few attorneys; that the judicial and compensation systems suffered; and that the injured employee gained little. In 1972 Congress amended the LHWCA to cure those problems with respect to one group of employers. There was no need to do so with respect to general contractors since § 904(a) already had resolved the problem.

The decision of the Court below, unless reversed by this Court, soon will present the general contractor, the insurance carrier as well as the judiciary with the very same problem Congress sought to eliminate in 1972. The injured worker whom the law is designed to protect will derive only minimal, if any, additional money. The purpose of workers' compensation is to provide readily available benefits, including medical expenses and rehabilitation, to the injured worker. Workers' compensation is not intended to be a vehicle for monetary gain to attorneys or for an increased burden on the Courts.

Amicus curiae submits that the decision below is wrong as a matter of law and that the social costs it will create are simply too great to support it. The decision should be reversed by this Court.

ARGUMENT

I. WMATA IS AN "EMPLOYER" WITHIN THE MEANING OF SECTION 904(a)

WMATA is, and was at the time these injuries occurred, an employer of some employees in the District of Columbia. Those WMATA employees were entitled to the compensation benefits prescribed by the federal Longshoremen's and Harbor Workers' Compensation Act ("LHWCA"), 33 U.S.C. § 901 *et seq.* because the District of Columbia Workers' Compensation Act, D.C. Code § 36-501 *et seq.* adopted the provisions of the LHWCA.¹ As to those employees WMATA is required by statute, § 904(a) of the Act, to secure the payment of compensation payable under §§ 907, 908 and 909 of the Act. An employer may fulfill that statutory obligation either by insurance purchased from an authorized insurance carrier or by a self-insurance program authorized by the Secretary of Labor pursuant to § 932 of the Act. For its administrative and operating employees WMATA chose to self-insure.

In addition, WMATA purchased insurance from an authorized carrier to meet its statutory duty under § 904 with respect to employees of subcontractors working on the METRO project by means of "wrap-up insurance" in which WMATA and the various subcontractors were named insureds. The second sentence of § 904(a) provides:

"In the case of an employer who is a subcontractor, the contractor shall be liable for and shall secure the payment of such compensation to the employees of the subcontractor unless the subcontractor has secured such payment."

A plain reading of that sentence, in the context of WMATA's situation, is that WMATA as an employer

¹ For simplicity, as did the Court below, references to the compensation act will be referred to by the federal statute section numbers.

and as a "contractor" has the primary obligation to secure compensation for its own and subcontractor's employees. However, if the subcontractor secures compensation, then WMATA may be relieved of that primary obligation as to that subcontractor's employees.

It seems clear that since the primary purpose of any workers' compensation act is to provide adequate compensation to all employees injured in the work place, regardless of fault, making the general, or overall, employer primarily responsible is the most certain way to accomplish that result. If a subcontractor undertakes to secure compensation, and only then, is the general contractor relieved of its § 904 responsibility. *Amicus curiae* believes that the Court below erroneously reversed the scheme of priorities intended by Congress.

II. THE COST TO THE WORKERS' COMPENSATION SYSTEM

The decision of the Court below will cause massive insurance problems for general contractors such as WMATA and for all subcontractors working on sites or projects involving multiple employers, and not one employee will benefit in the slightest. The courts will be flooded with third party actions, indemnity actions between contractors and subcontractors, and the insurance industry will be flooded with subrogation claims. No injured worker will receive an additional dollar in workers' compensation payments. The individual worker may receive some additional money in a successful third party action, but the prime beneficiary of the Court's decision is the plaintiff's bar which will receive *two* legal fees for each individual injury. The most adverse impact will fall upon a court system already overburdened with case backlogs of distressing size.

The decision below changes neither workers' compensation benefits nor those to whom such benefits are to be paid. All injured workers remain entitled to compensa-

tion benefits from their employer. Either their immediate employer or the employer of their employer (the general contractor) must secure the payment of those benefits. Wrap-up insurance is one way to secure such payments, and the *quid pro quo* is that the employee knows that if injured, someone is going to pay compensation benefits. It makes no difference to the employee who pays those benefits, so long as someone does and assures that prompt and adequate medical treatment is available.

Wrap-up insurance, and indeed the second sentence of § 904(a) of the Act, benefits all employees on a multi-employer job site more than it benefits the general contractor. In the case of WMATA and the instant proceeding wrap-up insurance also benefits the general public through reduction in the total cost of the taxpayer supported Metro system.

Workers' compensation insurance is now, and always has been, available to any employer, even those obliged to secure LHWCA insurance which no one denies is the most expensive workers' compensation law in the country. For example, on November 14, 1979, a subcommittee of the Congress was told the following:²

"One view of the costs of benefits mandated by the Longshoremen's and Harbor Workers' Act is to relate them to the WMATA project. The chart here demonstrates some of the following points.

The total of 31.2 miles of the Metrorail system are now in operation and there are 32.5 miles under construction: A total of 63.7 miles. So far the value of all work in place exceeds \$2.875 billion.

Compensation claims subject to the Longshoremen's and Harbor Workers' Act which were incurred under

² Oversight Hearings on the Longshoremen's and Harbor Workers' Compensation Act, Subcommittee on Labor Standards, Committee on Education and Labor, House of Representatives, Ninety-Sixth Congress, First Session, p. 181.

our policies since 1971 exceed \$111 million. *Relating the value of just those claims we are handling to the miles of the rapid rail transit system completed and partially completed, \$1.7 million of Longshoremen's claims have been incurred so far for each mile currently finished or under construction.*

In 1971, an average rate of \$7 per \$100 of workers' payroll was adequate to cover losses at the benefit levels then applying. The 1972 amendments to the act calling for expanded and annual increases in benefits resulted in periodic increases until now the average rate is \$53." (Emphasis supplied.)

There is no doubt that but for the wrap-up insurance program adopted by WMATA to fulfill its § 904 obligations, the cost would have been greater than \$1.7 million per mile of subway track, and the cost of insurance more than \$53 per \$100 of payroll.

How many small businesses can afford to pay \$53 or more per \$100 of payroll for workers' compensation insurance, and how many small businesses can compete for work with larger, more financially secure competitors? Wrap-up insurance attempts to solve not only the problem of overall cost but also the problem facing small and medium-size companies acquiring any insurance—not unavailability but unaffordability.

LHWCA insurance is available to an employer either in the voluntary insurance market, or by insurance pooling arrangements (assigned risk pools)³ or by state insurance funds when there is no voluntary insurance market. But it is always available somehow because the coverage is mandatory. However, to many it may be unaffordable. Unaffordability is caused by the terms of the law, not the insurance industry whose rates for workers' compensation premiums are subject to regulation by the several states and the District of Columbia. A de-

³ See footnote 4.

tailed explanation of the rate approval process appears at pages 161-179, Statement of George Reall, President, National Council on Compensation Insurance.⁴ No doubt WMATA was able to take advantage of the premium discounts described by Mr. Reall (Hearings—p. 164) and realized overall cost savings which it would not have realized had each subcontractor included its individual workers' compensation insurance costs in its bid to WMATA. However, under either system compensation benefits to individual employees remain the same, while under a single wrap-up policy *claims processing is expedited* to the injured worker's benefit, and system cost is reduced to the employer's (WMATA) benefit and that of the system user and taxpayer.

Expedited claims handling is the key to any successful workers' compensation program. The primary beneficiary is, of course, the injured employee. The system—and the insurance industry—are secondary beneficiaries along with employers. In testimony before the Congress, Mr. Maximilian Walach, Superintendent of Insurance, D.C. Department of Insurance, stated that insurance carriers providing workers' compensation insurance in the District of Columbia for all employers, except those involved in subway construction, had pure loss ratios under the LHWCA which rose from 54.9% in 1971 to 102.8% in 1976. The cause of the underwriting loss and the increase in premium in Mr. Walach's view is stated to be:⁵

⁴ Oversight Hearings on the Longshoremen's and Harbor Workers' Compensation Act, Subcommittee on Labor Standards, Committee on Education and Labor, House of Representatives, Ninety-Sixth Congress, First Session (November 14, 1979), pp. 161-179.

⁵ Oversight Hearings on the Longshoremen's and Harbor Workers' Compensation Act, Subcommittee on Compensation, Health and Safety, Committee on Education and Labor, House of Representatives, Ninety-Fifth Congress, First Session, Vol. 1, pp. 803-818 at pp. 808 and 810.

"It seems to be that the *rate* is only the *result* of various economic *causes*. Unless the various causes before injury and the claims handling afterwards, as well as the costs in providing medical benefits and other cost factors are reduced, premiums will not go down. One has to give first priority as to how to reduce costs of this program."

This is what WMATA intended to do, and in doing so directly benefited all employees working on the Metro system. This, *amicus curiae* suggests, is precisely what Congress intended by the second sentence of § 904(a) of the Act.

III. THE JUDICIAL SYSTEM IS THE LOSER

Having satisfied its charter obligations to conserve expenditures and its statutory duty to secure workers' compensation payments, WMATA and the courts in the District of Columbia find themselves faced with the specter of about 22,000 third party suits arising from Metro construction as a result of the decision of the Court below. All other employers subject to the LHWCA (except stevedore contractors) and the courts in the jurisdictions in which they do business are similarly faced with increased third party actions.

Based upon insurance industry experience, WMATA can expect, under its miscellaneous liability insurance, cost increases of about \$1 for every \$2 paid out in workers' compensation. Third party claims are paid and defended pursuant to an employer's general liability insurance policy while employee claims are paid pursuant to the workers' compensation insurance policy. In most cases, general liability insurance premiums are experience rated. Usually there is no assigned risk provision or guarantee of coverage as in the case of workers' compensation. General liability is for the employer's protection—workers' compensation is for the employee's protection. In many instances the employer may have different insurance car-

riers for each type of policy. Not all workers' compensation carriers offer general liability insurance, and not all general liability carriers offer workers' compensation insurance.

The decision of the Court below may well have ramifications on the employers, carriers, and judicial system beyond the potential of adding one third party negligence suit or claim for every worker's compensation claim. Some general contractors may resort to indemnification or hold harmless agreements from their subcontractors. Then, the judicial system may well find itself confronted with the additional burden of indemnification actions between contractor and subcontractor.

That is precisely the situation in which the federal judiciary, employers, and insurance carriers found themselves before 1972. A situation about which the judges in the Third Circuit complained in 1967 and 1968, *Turner v. Transportacion Maritime Mexicana, S.A.*, 44 FRD 412 (1968), and which Chief Judge Clary described in a statement published by the Subcommittee on Improvement in Judicial Machinery of the Committee on the Judiciary, United States Senate, in their document captioned "Crisis in the Federal Courts—1967." *Id.* at 416.

"While in 1961 the longshoremen cases constituted only 8% of the total tort actions, . . . they constituted more than 23% of the total tort actions in June of 1966. Had that trend continued in its same progressive growth for another five years, the longshoremen cases could have constituted almost 60% of the total tort actions in our Court. . . ."

In 1972 Congress sought to eliminate the problem of third party suits and indemnification actions among worker-stevedore contractor-vessel owner by substantially increasing LHWCA benefit levels; eliminating suits directly or indirectly against the stevedore contractors; and by restricting the grounds for third party actions (*Northeast*

Marine Terminal et al. v. Caputo et al., 432 U.S. 249 (1977). While increasing benefits to longshoremen employees of stevedores, Congress also increased benefits to the employees of every other employer subject to the LHWCA—WMATA included.

As no other group of LHWCA employers sought the specific relief from longshoreman-stevedore-vessel third party/indemnification actions which plagued the parties and the courts, the specific relief granted by Congress was limited. However, the second sentence of § 904(a) does provide the same legal protection to contractors and subcontractors unless it is interpreted as it has been by the Court below. In short, the decision of the Court below, if affirmed by this Court, will recreate the problem about which the judiciary complained in 1967-68 and which Congress thought it cured when it amended the LHWCA in 1972. For that reason alone, the decision of the Court below should be reversed.

The only certain beneficiaries of the decision of the Court below are the lawyers. As the Congress noted: *

"The social costs of these lawsuits, the delays, crowding of court calendars and the need to pay for lawyers' service have seldom resulted in a real increase in actual benefits for injured workers."

In large measure, the 1972 amendments to the LHWCA was Congress' answer to the question stated by Judge Higginbotham speaking for the judges of the U.S. District Court in Philadelphia and suggesting that Congress should make an inquiry into the LHWCA, to wit: †

"If there is such an inquiry, several questions should be asked: (1) Do longshoremen (in contrast to their lawyers) generally come out with better financial re-

* Senate Report No. 92-1125, 92nd Congress, 2d Session at p. 4, Senate Committee on Labor and Public Welfare, September 12, 1972.

† *Turner, supra*, at 420.

sults by reason of this quality of litigation than they would if they had somewhat increased benefits and the statute was truly exclusive?".

Amicus curiae submits that should this Court ask the question stated by Judge Higginbotham of the decision of the Court below it would come up with the same answer as did the Senate Committee on Labor and Public Welfare. The decision below will not result in any increase in compensation benefits and will seldom result in any real increase of money to an injured employee. The real increase is in legal fees and costs to the employer and therefore to the consumer.

IV. ATTORNEYS ARE THE WINNERS

It cannot be overemphasized that the primary purpose of the LHWCA and all other workers' compensation laws is to provide readily available medical care and timely compensation payments to injured employees. The injured employee is thus assured prompt and certain redress for the work place injury. The injured worker may, but is not required to, bring an action against a third party who may have caused the injury. If the employee does not bring such an action within six months of receiving a compensation award, the employer or insurance carrier may. The compensation paying employer "is entitled to reimbursement of all compensation benefits paid the employee, and its costs, including attorneys fees. Of the remainder, four fifths is distributed to the longshoremen, and one fifth 'shall belong to the employer'." *Bloomer v. Liberty Mutual Insurance Co.*, 445 U.S. 74 (1980) at 86.

If the employee brings the third party action and is successful, he is entitled to retain the amount of the judgment *less attorney's fees* and less the full amount of compensation paid by the employer. The employee would not be entitled to double compensation, and the employer would better be able to pay compensation benefits re-

quired by the LHWCA, *Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256 (1979), reh. den., 444 U.S. 889.

Another method Congress adopted to insure that the compensation system provided adequate benefits to injured employees was to control the legal fees that could be exacted in litigating LHWCA compensation claims. Section 928 of the Act provides that, in limited situations and subject to approval by the deputy commissioner, administrative law judge, the Benefits Review Board of the Department of Labor⁸ or reviewing court, legal fees of the employee are to be paid by the employer. *National Steel and Shipbuilding Co. v. U.S. Department of Labor, Office of Workers' Compensation Programs*, 606 F.2d 875 (9th Cir. 1979).

To no one's surprise, attorneys' fees assessed against the employer for services rendered to the injured employee, being subject to (1) challenge by the employer, and (2) supervision and review by the Department of Labor and U.S. Courts of Appeals, do not equal or approach the contingent fees attorneys receive in third party actions. Also, it is a criminal offense (§ 928(e) of the Act) to seek any additional payment from the injured worker. *Hensley v. Washington Metropolitan Area Transit Authority*, 690 F.2d 1054 (D.C. Cir. 1982), cert. den., 102 S. Ct. 1749 (1982).

With the injured worker's needs taken care of by the workers' compensation system and his modest (9 to 10%) legal fees having been paid by the employer, the injured worker's attorney next turns to a real or imagined third

⁸ The regulations published by the Department of Labor concerning attorneys' fees under § 928 are found at 20 C.F.R. § 702.132-702.135. Litigation concerning legal fees has been extensive; so much so that a synopsis of attorney fee litigation in the Department of Labor's *Longshore Desk Book*, Benefits Review Board Vol. A, BRBS 6-1 et seq. includes 24 pages of a total of 193 pages covering every section of the LHWCA.

party action under a contingent fee arrangement with the injured worker. This is the type of action in which the attorney stands to gain the most because if he wins anything by settlement or by judgment he gets paid first after costs. The injured worker has nothing to lose and might receive a bonus over and above his worker's compensation. All the attorney has to do is make sure that the third party action is brought within 6 months of the compensation award (§ 933(a) of the Act).

That is unless either the settlement or judgment does not greatly exceed the amount of the workers' compensation award as in *Johnson v. Sioux City & New Orleans Barge Lines*, 629 F.2d 1244 (7th Cir. 1980), *cert. den.*, 101 S.Ct. 408 (1980). That case involved an *appeal by the injured worker's attorney* from a district court decision which denied contingent legal fees of 40% which, after repayment of the compensation, would have resulted in *no money* to the injured worker. In denying such an unconscionable request the court noted at page 1249:

"Such reflexive litigation (third party) brought on behalf of a party with minimal interest in the outcome (the injured worker) is inconsistent with the Act's 'special incentives designed to encourage the stevedore (employer) to bring suit on its own if the longshoreman (injured employee) elects not to do so.' *Bloomer*, 445 U.S. at 86 n.12, 100 S.Ct. at 932 n.12. Congress, we believe, intended that the stevedore (employer) pursue those cases, rather than the longshoreman's (injured worker's) attorney, who may be motivated by an artificially inflated contingent fee." (Parenthetical inserts supplied).

A comparison of *Bloomer* and *Johnson*, *supra*, demonstrates that, unless the third party judgment or settlement is substantially greater than the workers' compensation award, the injured worker really stands to gain nothing from a third party action brought on his behalf. The controlling factor in settlement negotiations or jury de-

mands thus becomes attorney fees. Pressures mount for excessive damages or for the employer/insurance carrier to waive or reduce the compensation lien.

Amicus curiae submits that Congress did not intend to encourage (1) suits between attorney and injured employees about legal fees; (2) settlement negotiation pressures to compel an employer to contribute directly or indirectly to a third party's damage payment and thus reduce his ability to provide workers' compensation; or (3) third party actions brought by attorneys for their own benefit in the name of a party who may have a minimal interest in the outcome.

The social costs of these suits, as the Senate Committee noted in 1972, are just too high and the potential benefits to the injured worker too low to justify the decision of the Court below. The added cost to the already overburdened workers' compensation system of the United States would be unacceptable to insureds, insurers, and self-insured employers. It is estimated that in 1983 some \$2,720,000,000 was paid in premiums nationwide for workers' compensation insurance. At the same time the insurance industry incurred a combined loss and expense ratio of 100.08% before dividends, or 110.4% after dividends. The situation in which the workers' compensation system now finds itself has been described as follows:⁹

"If, in terms of contract and of regulation of the business, the long range outlook for workers' compensation is uncertain, the short range underwriting prospects are not: This line has been losing money since 1971 to a total of \$6.7 billion, with 20% of that falling in 1983—and all signs point downhill."

⁹ *Best's Review*, Property/Casualty Insurance Journal, January 1984, p. 95.

CONCLUSION

Unless the decision of the Court below is reversed, the deterioration of the workers' compensation system will be exacerbated and the social costs of the additional litigation spawned by the decision will rise to intolerable levels—all for the benefit of a few and with minimal benefit to the injured worker the system was designed to protect.

For the foregoing reasons, *amicus curiae* urges this Court to reverse the judgments of the Court below.

Respectfully submitted,

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1983

WASHINGTON METROPOLITAN AREA
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v. *Petitioner,*
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On Writ of Certiorari to the United States Court of Appeals
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JOINT BRIEF OF CERTAIN METRO SUBWAY
CONSTRUCTION CONTRACTOR-EMPLOYERS
AS AMICI CURIAE IN SUPPORT OF THE
JUDGMENT OF THE COURT OF APPEALS

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TABLE OF CONTENTS

	Page
TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii
IDENTITY AND INTERESTS OF THE AMICI.....	1
INTRODUCTION AND SUMMARY OF ARGU- MENT	3
ARGUMENT	
I. THROUGHOUT ITS PHASE II METRO CON- STRUCTION ACTIVITIES EACH CONTRAC- TOR-EMPLOYER WAS COMPLETELY IN- SURED FOR DISTRICT OF COLUMBIA WORKERS' COMPENSATION LIABILITY....	4
II. ALL PHASE II CONTRACTORS SECURED THE PAYMENT OF COMPENSATION BENE- FITS AND ARE ENTITLED TO THE EM- PLOYER'S IMMUNITY	8
III. THE PROPER APPLICATION OF THE QUID PRO QUO DOCTRINE SUPPORTS THE CON- TRACTORS' IMMUNITY	10
CONCLUSION	13

TABLE OF AUTHORITIES

<i>Cases</i>	<i>Page</i>
Cardillo v. Liberty Mutual Insurance Company, 330 U.S. 469 (1947)	10-11
Crowell v. Benson, 285 U.S. 22 (1932)	10
DiNicola v. George Hyman Construction Co., 407 A.2d 670 (D.C. App. 1979)	9
Director, OWCP v. National Van Lines, Inc., 613 F.2d 972 (D.C. Cir. 1979), <i>cert. denied</i> , 448 U.S. 907 (1980)	9
Edwards v. Bechtel Associates Professional Corp., 466 A.2d 436 (D.C. App. 1983), <i>cert. denied</i> , No. 83-560 (Nov. 28, 1983)	8
Jones Laughlin Steel Corp. v. Pfeifer, 76 L.Ed.2d 768 (1983)	12
Lindler v. District of Columbia, 502 F.2d 495 (D.C. Cir. 1974)	9
Morrison-Knudsen Construction Co. v. Director, OWCP, 103 S.Ct. 2045 (1983)	8
Potomac Electric Power Company v. Director, OWCP, 449 U.S. 268 (1980)	11
<i>Statutes</i>	
District of Columbia Workmen's Compensation Act (1973):	
D.C. Code §§ 36-501	3
Longshoremen's and Harbor Workers' Compensa- tion Act (1976):	
33 U.S.C. §§ 904	<i>passim</i>
33 U.S.C. §§ 905	<i>passim</i>
33 U.S.C. §§ 932	9
33 U.S.C. §§ 933	12
<i>Other Authorities</i>	
A. Larson, The Law of Workmen's Compensation (1982)	9

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IDENTITY AND INTERESTS OF AMICI

Amici are prime contractors engaged at various times after July, 1971 by the Washington Metropolitan Area Transit Authority (WMATA) to perform Phase II subway construction work. *See* Pet. Br. 5-6, 8 (J.A. 110-111, 312).^{*} These entities, which were successful contract bidders, are: Gordon H. Ball, Inc.; Fruin-Colnin; Granite Construction Company; S. A. Healy Company; MacLean-Grove-Skanska Joint Venture; Morrison-Knudsen

^{*} Petitioner and Respondents have consented to the filing of this Joint Amici Brief. The letters of consent have been filed with the Clerk of the Court.

Contractors; and, Slattery Associates, Inc. Amici support the judgment of the Court of Appeals in its determination that WMATA, if viewed as a volunteer, was not entitled to an employer's immunity from suit under the District of Columbia Workers' Compensation Act. The contractor-employers who did secure compensation benefits are entitled to the statutory immunity. However, Amici believe that WMATA can have immunity, as a matter of policy, but not at their expense. That is, this Court could interpret the Act, under the unique circumstances of the innovative and beneficial Wrap-Up insurance program, as providing a general contractor or builder with § 905(a) immunity together with the contractor-employers.

These entities appeared as Amici before the United States Court of Appeals (J.A. 5). The plaintiffs in each of these cases had been employed by one or more of the Amici.

However, none of these Amici was a party to this litigation at the time of the decisions of the United States District Court judges (Pet. App. 1a-26a). Thus, none was in an adversarial role as to the present question. In spite of this, two of the district judges expressly encouraged the plaintiff employees to bring common law suits against their contractor-employers (Pet. App. 11a n.2, 17a-18a). Thereafter, Amici, and other employers, began to be named as defendants in direct tort actions brought by their former construction employees. Amici are presently parties defendant in various Metro Subway Litigation cases now pending before the United States District Court for the District of Columbia. See Pet. Br. 36-37 & n.49. The workers bringing suit had also claimed workmen's compensation benefits from these same employers.

In its Brief, WMATA presents itself as a builder or general contractor. Petitioner argues that it had a duty to secure workers' compensation insurance pursuant to the provisions of § 904 of the Longshoremen's and Har-

bor Workers' Compensation Act (LHWCA or Act). Then, having fulfilled its "duty," WMATA concludes that it is entitled to immunity from employee common law suits by virtue of the provisions of § 905(a) of the Act. That argument, if accepted, may result in a denial of immunity to the Amici, contrary to the purposes of the Act and the guarantees made in WMATA's Coordinated Insurance Program (J.A. 104).

Amici submit that they have a direct interest in the present case. The Court of Appeals refrained from determining whether they, as employers, "secured" the payment of compensation benefits for their injured workers. However, the decision below can be read to conclude that the § 905(a) immunity is available either to a securing general contractor or a securing employer, but not both. Thus, Amici find themselves in a position of having potentially lost the benefit that they assumed they had, without ever having been in an adversarial position when the question was decided.

These prime contractors are presently at risk. A decision by this Court could result in a denial of the employer's exclusive liability, the continued prosecution of claims by former employees of Amici and the institution of many additional suits. It is for these reasons that Amici appear.

INTRODUCTION AND SUMMARY OF ARGUMENT

This litigation presents an issue of statutory construction under the District of Columbia Workmen's Compensation Act of 1928, ch. 612, §§ 1-3, 45 Stat. 600 (1928) (codified at D.C. Code 1973 §§ 36-501, *et seq.*). That statute extended the provisions of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901 *et seq.* (1976), to private sector employment in the District of Columbia.

When the facts which govern the proceedings below are fully understood, it becomes clear that these Amici did secure the payment of workers' compensation benefits to Respondents, and all of their Phase II construction workers, through their participation in WMATA's bid offering process and their bids. Each contractor-employer was a named insured on the CIP Workmen's Compensation Policy and benefits were paid to injured workers. Each Phase II contractor, therefore, complied with § 904(a) of the Act and is thereby entitled to the employer's "exclusive liability" or immunity provided by § 905(a).

The question before this Court is not, as between WMATA and its contractors, which should enjoy § 905 (a) immunity. That is, the issue should not be framed as an either/or choice. In its Reply Brief, Petitioner acknowledged that *both* WMATA and its contractors could be deemed to have secured workmen's compensation benefits. See Pet. Reply at 4. Amici share this view.

ARGUMENT

I. THROUGHOUT THEIR PHASE II METRO CONSTRUCTION ACTIVITIES EACH CONTRACTOR-EMPLOYER WAS INSURED FOR DISTRICT OF COLUMBIA WORKERS' COMPENSATION LIABILITY

During the first two years of the Metro subway construction project, each contractor secured its own worker's compensation insurance and included the cost of such premiums in its bid. For administrative reasons, as fully set forth in Petitioner's brief, WMATA instituted a Coordinated Insurance Program (CIP or Wrap-Up) which became effective on July 30, 1971. For all projects beginning on or after October 1, 1971, WMATA provided comprehensive liability and compensation coverage for all of its contractors on all construction sites (J.A. 104, 128). Full coverage was purchased by WMATA and was in place before a single bid was solicited or be-

fore the identity of any ultimate contractor became known.

During Phase II, all potential contractors were advised that compensation insurance existed. In the Insurance Specifications which accompanied a bid offering, WMATA stated: "Insurance premium cost for coverages provided are paid by WMATA and contractors are expected to recognize this fact in submitting their bids" (J.A. 104). Of course, a contractor could obtain duplicate coverage at his own expense, but as a practical matter the cost of that insurance would ensure the rejection of the bid. The Insurance Specifications also expressly stated that WMATA would procure workers' compensation insurance "for the benefit of contractors and others" (J.A. 106).

As a result of the Wrap-Up, each successful bidding contractor became a named insured on the compensation policy and was issued a certificate of insurance in its own name at the time that the bid was accepted (J.A. 128, 225). At no time was WMATA a named insured for workers' compensation (J.A. 128). Indeed, all compensation payments made to date for any worker injury claim have been paid in the name of the appropriate employer-contractor (J.A. 47-61).

Petitioner's Brief correctly notes that the contractors did not "purchase" the insurance applicable to the Metro project. WMATA also states that the bid offering allowed any bidder to purchase its own insurance if desired. These statements may create an impression that the contractors chose not to secure insurance after having been offered the opportunity to do so. Such is not the case.

The workmen's compensation policy on which each contractor was an express, named insured, provided "statutory" coverage limits and specifically included "all com-

pensation and other benefits required of the insured by the workmen's compensation law" (J.A. 106, 113). The term "workmen's compensation law" included the law of the District of Columbia (J.A. 114, 127).

Accordingly, each Phase II contractor employer was explicitly and automatically insured for its total statutory workmen's compensation liability under the District of Columbia worker's compensation law during its participation in any given Metro construction project (J.A. 266-267).

By agreeing to become a named insured on the CIP workmen's compensation policy, each contractor-employer expressly undertook various specified duties and responsibilities.¹ These included: cooperating and assisting in the resolution of claims and lawsuits (J.A. 120); cooperating with the policy issuing insurance company (J.A. 110); and, providing notice of any injury, claim or suit (J.A. 119-120). Moreover, by accepting the policy, each contractor-employer adopted the declarations' statements as its own agreements and representations upon which the insurer relied in issuing the policy (J.A. 124).

In short, each Phase II contractor was a true insured under the CIP workmen's compensation policy throughout its participation in Metro construction activities (J.A. 128).

The Amici, whether contractors or subcontractors, certainly concluded that they did secure workmen's compensation insurance. They honored WMATA's bid offering, accepted the proffered coverage and eliminated that po-

¹ They also could have been required, in the event of a cancellation of the CIP insurance, to purchase alternative insurance on a reimbursable basis (J.A. 108-109). Coverages not provided under the Program were required by WMATA to be procured by each contractor/subcontractor (J.A. 216-218).

tential cost from their bids. They were each provided with a certificate which named them, and not WMATA, as the insured on the Compensation Policy (J.A. 128). Thus, they continually carried the required insurance. The suggestion made that since WMATA paid for the insurance, it, rather than the contractors secured it, does not bear close scrutiny. WMATA would "pay" for insurance in one way or another: either the cost would be indirectly borne by the Authority through higher bids (if contractors were to include the cost of their own insurance), or the cost would be directly absorbed as part of the Wrap-Up.

The Amici at no time were "uninsured" and at no time did they fail to carry compensation insurance for their employees. As previously demonstrated, each successful bidder on the Metro subway construction project was assured of complete, adequate compensation insurance coverage at the very instant that the bid was accepted. The bidders had eliminated the cost of procuring their own insurance at the behest of WMATA.

For WMATA to state that it had a duty to procure insurance for its "sub-contractors" because they had not done so is an argument that has come as no small surprise to the Amici. In reality, the history of the Coordinated Insurance Program is plain. The Authority made a deliberate decision to embark upon a Wrap-Up plan which provided many benefits, including a substantial savings in overall costs.

But, subsequent arguments before various district judges created the mistaken impression that the contractors had been derelict in their statutory duties. That is simply not true. The Amici insured the payment of workers' compensation benefits to their employees by bidding successfully on a project.

II. ALL PHASE II CONTRACTORS SECURED THE PAYMENT OF COMPENSATION BENEFITS AND ARE ENTITLED TO THE EMPLOYER'S IMMUNITY

As this Court has recognized, the LHWCA is not "a simple remedial statute intended for the benefit of workers." *Morrison-Knudsen Construction Co. v. Director, OWCP*, 103 S.Ct. 2045, 2052 (1983). Rather, the Act rests upon compromise and strikes a balance between the interests of employees in immediate benefits for work-related injuries and the interests of employers in finite and predictable liability to those employees.

An employer's interest is recognized in § 905(a) of the Act which states, in relevant part: "The liability of the employer prescribed in § 904 [i.e. to secure the payment of compensation benefits] shall be exclusive and in place of all other liability of such employer to the employee. . . ."

Under § 905(a), an employer is expressly made immune from tort liability to an employee except where that employer "fails to secure payment of compensation. . . ." That is, an employer's exclusive liability is to provide workmen's compensation benefits to an insured worker unless it has not made such benefits available.

Here, the undisputed facts described above demonstrate that the Metro Phase II subway construction contractors did secure the payment of compensation benefits for their employees as required by the Act. Indeed, the District of Columbia Court of Appeals has so determined. In *Edwards v. Bechtel Associates Professional Corp.*, 466 A.2d 436, 438 (D.C. App. 1983), *cert. denied*, No. 83-560 (Nov. 28, 1983), that court held: "[n]otwithstanding that WMATA paid for the insurance, appellants' employers [Metro contractors] did secure the compensation payments under the terms of their contracts with WMATA. Further, compensation claims were made with appellants' employers and against their

named policies. We are satisfied, therefore, that the statutory requirement has been met."

This determination is consistent with other District of Columbia court decisions which have rejected the view that § 905(a) exclusive liability should flow to the entity which ultimately bears the costs of construction compensation insurance. *DiNicola v. George Hyman Construction Co.*, 407 A.2d 670, 674 (D.C. App. 1979); *Lindler v. District of Columbia*, 502 F.2d 495 (D.C. Cir. 1974).

The requirement under § 904(a) that an employer "secure the payment of compensation benefits" does not mean that the employer must itself pay premiums to purchase workmen's compensation insurance. That may be one method selected by an employer but it is not the exclusive avenue available. Where, as here, construction employers contractually agree to become insureds under a compensation policy, and forego the inclusion of insurance costs in their bids, they obligate another to pay compensation and thereby secure benefits for their employees. This method meets the intent of § 904(a) "to protect injured employees engaged in a common enterprise from the irresponsible failure of their immediate employers to insure." *Director, OWCP v. National Van Lines, Inc.*, 613 F.2d 972, 986 (D.C. Cir. 1979), *cert. denied*, 448 U.S. 907 (1980). It also comports with § 932 of the Act which requires that an employer secure the payment of compensation "by insuring and keeping insured the payment of such compensation with any stock company or mutual company or association, or with any other person or fund. . . ."

Under the Act and as a matter of substance, the contractor-employers secured the payment of compensation benefits. See A. Larson, *The Law of Workmen's Compensation*, § 67.22 at 12-82, 83 (1982) (noting that courts focus on substance and not form to determine whether

an employer has secured compensation benefits). They are entitled, therefore, as a matter of plain statutory application to the "exclusive liability" or immunity provided under § 905(a) of the Act.²

III. THE PROPER APPLICATION OF THE QUID PRO QUO DOCTRINE SUPPORTS THE CONTRACTORS' IMMUNITY

The decision of the Court of Appeals expressed the view that had WMATA been legally required to purchase workmen's compensation insurance for its construction contractors it could have received the Section 905(a) employer's "immunity" (Pet. App. 54a-55a). Petitioner has noted this view and asserts its validity in the *quid pro quo* context. See Pet. Br. at 15.

Amici suggest that, as a matter of policy and under the unique circumstances of the Wrap-Up insurance program, WMATA may be entitled to the benefit of some type of immunity. However, to the extent that any suggestion is made that immunity can be given to WMATA to the exclusion of the contractors, the Amici reject such a theory as contrary to the Act and its *quid pro quo* foundation.

The *quid pro quo* or compromise nature of workmen's compensation statutes has been expressly recognized by this Court.³ In *Cardillo v. Liberty Mutual Insurance*,

² Public policy supports § 905(a) immunity for the contractors. The contractors secured the payment of compensation benefits by contract and in good faith. Their efforts should not be frustrated by a narrow application of the Act. Elimination of the employer's statutory exclusive liability would expose contractors to indeterminate tort liability, a result plainly not bargained for by the contractors. Denial of immunity would also, of necessity, increase construction costs for large projects, such as Metro, due to a duplication of insurance costs.

³ This Court in *Crowell v. Benson*, 285 U.S. 22, 38 (1932) has stated that the master-servant employer relationship was a fundamental requirement supporting the constitutionality of the LHWCA.

330 U.S. 469 (1947), Justice Murphy described the doctrine in relation to the Act at issue here:

A prime purpose of the Act is to provide residents of the District of Columbia with a practical and expeditious remedy for their industrial accidents and to place on District of Columbia employers a limited and determinate liability.

330 U.S. at 476.

More recently, in *Potomac Electric Power Company v. Director, OWCP*, 449 U.S. 268 (1980), this Court again recognized that "the LHWCA represents a compromise between the competing interests of disabled laborers and their employers," citing with approval the following commentary:

Workmen's compensation acts are in the nature of a compromise or quid pro quo between employer and employee. Employers relinquish certain legal rights which the law affords to them and so, in turn, do the employees. Employers give up the common-law defenses of the fellow servant rule and assumption of risk. Employees are assured hospital and medical care and subsistence during the convalescence period. In return for a fixed schedule of payments and a fixed amount in the event of the worker's death, employers are made certain that irrespective of their fault, liability to an injured workman is limited under workmen's compensation. Employees, on the other hand, ordinarily give up the right of suit for damages for personal injuries against employers in return for the certainty of compensation payments as recompense for those injuries. 1 M. Norris, *The Law of Maritime Personal Injuries* § 55, p. 102 (3d ed. 1975).

449 U.S. at 282 and n.24.

The *quid pro quo* flows between the employee and his/her employer. Each gives up certain rights but receives concomitant benefits. Employees, such as Respondents,

forego an ability to file common law tort actions against their employers but they receive certain and immediate compensation benefits. Employers, such as Amici, give up certain common-law defenses while securing the payment of compensation benefits to their injured employees. As an essential part of this compromise process, the employer receives a limitation on its liability to injured employees. That liability is limited to compensation benefits. See 33 U.S.C. § 905(a).⁴

Under the Act, the *quid pro quo* analysis must focus upon the master-servant employment relationship. Here, the Respondent/employees filed for and received compensation benefits. These claims for compensation were lodged against the appropriate contractor-employers (J.A. 64, 66). Benefits were received through a workmen's compensation policy which insured each contractor-employer for its total statutory liability (J.A. 51, 56, 128). Under these circumstances, the *quid pro quo* process functioned as intended and the Section 905(a) employer's exclusive liability for compensation was achieved. The fact that a general contractor or builder, which was not a direct employer, purchased the workmen's compensation policy to benefit the contractor-employers does not alter the analysis.⁵

⁴ An employer which does not secure the payment of compensation benefits remains liable either for workers' compensation or for negligence, at the election of the injured employee. If a tort action is filed, the employer is precluded from asserting the affirmative defenses of fellow-servant negligence, assumption of the risk and contributory negligence. 33 U.S.C. § 905(a). A non-employer, as defined in 33 U.S.C. § 933(a), may be subject to suit in tort but does not forego any defenses. This statutory scheme implicitly recognizes, therefore, that a true third party cannot participate in the *quid pro quo* process since it gives up no rights.

⁵ This Court's decision in *Jones Laughlin Steel Corp. v. Pfeifer*, 76 L.Ed.2d 768 (1983) would appear to preclude an owner from obtaining § 905(a) immunity, even if it pays compensation as an employer, when the provisions of § 905(b) apply.

Therefore, to the extent that the decision of the Court of Appeals suggests that the employer's exclusive liability under Section 905(a) can be taken from the contractors under the facts presented here, that suggestion should be rejected.

CONCLUSION

Under the Act and the cases construing the statutory provisions at issue here, the ultimate judgment of the Court of Appeals can be affirmed while recognizing that the Metro construction contractors have immunity which may also be shared by WMATA.

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BRIEF AMICUS CURIAE OF THE
NATIONAL ASSOCIATION OF
MINORITY CONTRACTORS
IN SUPPORT OF THE PETITIONER

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF AMICUS	1
SUMMARY OF ARGUMENT	3
ARGUMENT	4
A. The Court of Appeals' Decision Provides Second Recoveries for a Few Employees, While it Eviscerates the Basic Policies and Purposes of the LHWCA to the Detriment of all Employees..	4
B. The Court of Appeals' Decision Will Reimpose An Economic Barrier to Minority Participation that Was Eliminated by WMATA's Wrap-up Insurance Program	6
C. The Court of Appeals' Decision Will Subject The Employees of Minority Contractors To Periods Without Compensation Coverage	9
D. The Court of Appeals' Decision Will Cause an Enormous Drain on WMATA's Limited Federal Funds, Further Reducing Minority Participation in the Metro Project	10
E. The Court of Appeals' Decision Will Dissuade Contractors from Utilizing Subcontractors Because of their Exposure to Liability for Negligence Actions	12
CONCLUSION	13
APPENDICES	1a

II

TABLE OF AUTHORITIES

Cases	Page
<i>Bloomer v. Liberty Mutual Ins. Co.</i> , 445 U.S. 74 (1980)	11
<i>Cardillo v. Liberty Mutual Ins. Co.</i> , 330 U.S. 469 (1947)	5
<i>Director, OWCP v. National Van Lines</i> , 613 F.2d 972 (D.C. Cir. 1979), <i>cert. denied</i> , 448 U.S. 907 (1980)	5
<i>Hilyer v. Morrison-Knudsen Construction Co.</i> , 670 F.2d 708 (D.C. Cir. 1981), <i>rev'd sub nom. Morrison-Knudsen Construction Co. v. Director, OWCP</i> , 103 S. Ct. 2045 (1983)	4
<i>Potomac Electric Power Co. v. Director, OWCP</i> , 449 U.S. 268 (1980)	5
<i>Potomac Electric Power Co. v. Director, OWCP</i> , 606 F.2d 1324 (D.C. Cir. 1970), <i>rev'd</i> , 449 U.S. 268 (1980)	4, 5
<i>Potomac Electric Power Co. v. Wynn</i> , 343 F.2d 295 (D.C. Cir. 1965)	4
<i>Riley v. U.S. Industries/Federal Sheet Metal, Inc.</i> 627 F.2d 455 (D.C. Cir. 1980), <i>rev'd sub nom. U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP</i> , 455 U.S. 608 (1982)	4
<i>Rodriguez v. Compass Shipping Co.</i> , 451 U.S. 596 (1981)	4
<i>United Steel Workers of America v. Weber</i> , 443 U.S. 193 (1979)	7
Statutes/Regulations	
Longshoremen's and Harbor Workers' Compensation Act (1976):	
33 U.S.C. § 904	<i>passim</i>
Title VI, Civil Rights Act of 1964, 42 U.S.C. §§ 2000d-2000d-5 (1976)	12
Urban Mass Transportation Act of 1964, 49 U.S.C. § 1608 (1976)	12
49 C.F.R. §§ 23.43-23.45 & Appendix A (1983)	12

TABLE OF AUTHORITIES—Continued

<i>Congressional Material</i>	Page
<i>Hearings on Appropriations Before a Subcomm. of the House Comm. on Appropriations, 92d Cong., 2d Sess. (Mar. 20, 1972)</i>	7
<i>Hearings on H.R. 247, et al., Before the Select Subcomm. on Labor of the House Comm. on Education and Labor, 92d Cong., 2d Sess. (1972)</i>	11
<i>Other Authorities</i>	
1C A. Larson, <i>The Law of Workmen's Compensation</i> , § 49.11 (1982)	5
Urban Mass Transportation Administration, Department of Transportation, Circular C1165.1 (Dec. 30, 1977)	8
General Services Administration, <i>Wrap Up Study</i> (Aug. 22, 1975)	8
Barrett, <i>Insurance for Urban Transportation Construction</i> , Report No. UMTA-MA-06-0025-77-13 (Dept. of Transp. 1977)	8, 9
<i>Metro Is Urged to Set Minority Goals Higher</i> , Washington Post, Nov. 24, 1983	10
<i>Miscellaneous Material</i>	
Paper on Benefits to Minority Contractors from Coordinated Insurance Program, submitted by WMATA General Manager Jackson Graham to WMATA's Board of Directors on July 20, 1971..	7
Letter to The Honorable John J. McMillan from Mr. Graham W. Watt, Ass't to the Commissioner, dated April 3, 1970	7

IN THE
Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-747

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY,
v. *Petitioner,*

PAUL D. JOHNSON, *et al.*,
Respondents.

On Writ of Certiorari to the United States Circuit Court
of Appeals for the District of Columbia Circuit

BRIEF AMICUS CURIAE OF THE
NATIONAL ASSOCIATION OF
MINORITY CONTRACTORS
IN SUPPORT OF THE PETITIONER

The National Association of Minority Contractors, appearing as *amicus curiae* in support of the petitioner, urges the reversal of the decision below.*

INTEREST OF AMICUS CURIAE

The National Association of Minority Contractors is a nation-wide organization representing minority-owned companies that are principally engaged in the construction industry. Because of the long existing racial imbalance in the construction industry, most minority contractors are small, new companies. One major barrier these companies face in competing with larger contractors is

* Petitioner and Respondents have consented to the filing of this Brief Amicus Curiae, and the letters of consent have been filed with the Clerk of the Court.

obtaining workers' compensation insurance at affordable rates. Minority contractors are usually able to compete with the more established, larger non-minority contractors only through federal assistance and through innovative methods of removing financial impediments, such as the cost of obtaining workmen's compensation insurance. The participation of minority contractors in the WMATA construction project has been enhanced by the implementation of WMATA's wrap-up insurance program, which provides compensation insurance for the employees of all contractors working on the project. This program, therefore, eliminates the cost of insurance as an obstacle to minority participation.¹

The decision below challenges WMATA's wrap-up program as a "deviation from the statutory scheme" of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901 to 950 (1976) (hereafter the "LHWCA") (Pet. App. 56a). The decision holds that WMATA had no duty to provide compensation coverage for the employees of its subcontractors and that the wrap-up program was merely a "voluntary act" that does not entitle WMATA to statutory immunity from tort suit under the LHWCA (Pet. App. 52a to 56a).

The decision thus portends the termination of WMATA's wrap-up program and will obviously discourage the use of similar comprehensive insurance programs in other projects subject to the LHWCA. The decision will markedly decrease and probably end the participation of most minority contractors in the WMATA project for two reasons. First, the opinion destroys an insurance program that removed an insurmountable impediment to the participation of minority contractors: the high, and often pro-

¹ WMATA's wrap-up program also provides that the insurance carrier shall "provide construction contract surety bonds to small businesses and minority enterprises," thus meeting another serious financial impediment to minority participation in the WMATA project. See WMATA's Joint Appendix at 81, 93-94.

hibitive, cost of compensation coverage for their employees. Second, it will drastically reduce the available federal funds for project construction, because funds must be shifted to cover the costs of the third-party litigation invited by the opinion below.

SUMMARY OF ARGUMENT

The plain language of Section 904 of the LHWCA imposes a straightforward duty on a general contractor to secure the payment of compensation benefits for the employees of its subcontractors. WMATA's wrap-up program met that statutory duty by providing compensation insurance covering all employees engaged in the construction of the WMATA system. Under the rubric of liberal construction, the panel below (hereafter the "Court of Appeals") in effect redrafted Section 904 to deny the existence of this duty and any statutory immunity that would ensue from meeting it.

The result of this judicial legislation is the probable termination of an insurance program that provided compensation coverage for all employees, regardless of the financial ability of their employer. This will reimpose the financial impediment to minority participation presented by the high cost of compensation insurance. Further, it will decrease the opportunities for such participation because WMATA funds, which would otherwise be used for construction, will have to be reallocated to cover the costs of less efficient, individual insurance coverage and the costs of litigating the third-party actions invited by the decision below.

By redrafting Section 904, the Court of Appeals has defeated the LHWCA's goal of continuous compensation coverage for all employees and has seriously impaired the ability of minority contractors to participate in the WMATA project and other projects subject to the Act. Accordingly, the National Association of Minority Contractors respectfully urges the reversal of the decision below.

ARGUMENT

A. The Court of Appeals' Decision Provides Second Recoveries for a Few Employees, While it Eviscerates the Basic Policies and Purposes of the LHWCA to the Detriment of all Employees.

Despite the repeated admonitions of this Court,² the Court of Appeals, by its decision, has once again re-drafted a provision of the LHWCA under the rejected principle that the LHWCA must be "construed liberally" for the sole benefit of employees (Pet. App. 51a). The Court of Appeals recast Section 904 of the LHWCA,³ by denying the existence of a duty on general contractors to secure compensation and by creating a new duty that obligates a contractor merely to "require its subcontractors to purchase insurance" (Pet. App. 54a). Having rewritten Section 904, the Court of Appeals then asserted that WMATA's wrap-up insurance program is inconsistent with the Court's revised Section 904 and that WMATA's provision of compensation benefits to the respondents was a "voluntary act" contrary to the LHWCA, which did not entitle WMATA to the *quid pro quo* of statutory immunity (Pet. App. 52a to 56a).

² Compare *Rodriguez v. Compass Shipping Co.*, 451 U.S. 596 (1981), with *Potomac Elec. Power Co. v. Wynn*, 343 F.2d 295 (D.C. Cir. 1965); see also *Hilyer v. Morrison-Knudsen Construction Co.*, 670 F.2d 708 (D.C. Cir. 1981), *rev'd sub nom. Morrison-Knudsen Construction Co. v. Director, OWCP*, 103 S. Ct. 2045 (1983); *Riley v. U.S. Industries/Federal Sheet Metal, Inc.*, 627 F.2d 455 (D.C. Cir. 1980), *rev'd sub nom. U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608 (1982); *Potomac Elec. Power Co. v. Director, OWCP*, 606 F.2d 1324 (D.C. Cir. 1970), *rev'd*, 449 U.S. 268 (1980).

³ Section 904(a) provides: "Every employer shall be liable for and shall secure the payment to his employees of the compensation payable under sections 907, 908 and 909 of this title. In the case of an employer who is a subcontractor, the contractor shall be liable for and shall secure the payment of such compensation to employees of the subcontractor unless the subcontractor has secured such payment."

The Court of Appeals' revision of Section 904 defeats the underlying purposes of the LHWCA. These purposes, like those of all workmen's compensation acts, are to ensure the provision of immediate, fixed compensation benefits to injured employees, without regard to fault or resort to litigation, and to impose a limited and determinate liability on the employers required to provide such benefits.⁴ Section 904 meets the goal of ensuring compensation by imposing the duty to provide such benefits on "[e]very employer [who] shall be liable and shall secure the payment to his employees of . . . compensation" If the employer is a subcontractor, the plain language of Section 904 imposes the same employer's duty to secure compensation on the general contractor in order to ensure that all employees in a common enterprise are protected by compensation coverage regardless of the financial viability, ability or responsibility of any employees' immediate employer.⁵

WMATA's wrap-up insurance program clearly met the goals and purposes of the LHWCA because the wrap-up program provided continuous and all-encompassing coverage for every employee engaged in the construction of the WMATA project. This wrap-up program has handled 22,000 claims.⁶ The Court of Appeals, however, has rejected this program in order to provide the respondents here (and perhaps the other 22,000 claimants) the ability to obtain a second recovery against the party that secured and paid their compensation benefits. The Court of Appeals ignored the practical and undisputed unavailability

⁴ See, e.g., *Potomac Elec. Power Co. v. Director, OWCP*, 449 U.S. 268, 281 (1980); *Cardillo v. Liberty Mutual Ins. Co.*, 330 U.S. 469, 476 (1947).

⁵ *Director, OWCP v. National Van Lines*, 198 U.S. App. D.C. 239, 613 F.2d 972, 986-987 (D.C. Cir. 1979), *cert. denied*, 448 U.S. 907 (1980); see also 1C A. Larson, *The Law of Workmen's Compensation* § 49.11, at 9-12 to 9-16 (1982).

⁶ See Brief for the Petitioner at 36.

of an alternative program for each and every contractor to provide continuous compensation coverage.⁷ The Court of Appeals similarly ignored Section 904 and imposed its own system, which, as discussed further below, will invariably lead to gaps in coverage for various employees,⁸ particularly those of minority contractors, and will markedly increase third-party litigation.⁹

The Court of Appeals' decision, therefore, defeats the basic goal of the LHWCA and Section 904: it rejects a program that provided coverage to all employees, it subjects the sole purchaser of compensation coverage to unlimited tort liability, and it opens a Pandora's Box of litigation whenever there is a hierarchy of employers or contractors.

B. The Court of Appeals' Decision Will Reimpose An Economic Barrier to Minority Participation that Was Eliminated by WMATA's Wrap-Up Insurance Program.

By holding WMATA's wrap-up program to be a "deviation" from the LHWCA (Pet. App. 55a-56a) and by denying WMATA any *quid pro quo* for implementing the program, the Court of Appeals' decision probably marks the end of that program. The termination of WMATA's wrap-up program would preclude most minority contractors from successfully bidding for construction contracts.¹⁰

⁷ *Id.* at 20-22.

⁸ See discussion at Section C, *infra*.

⁹ See discussion at Section D, *infra*. See also the discussion of the litigation explosion that has already followed this opinion in the Brief for the Petitioner at 36.

¹⁰ WMATA's counsel had early determined that the interstate compact that created WMATA precludes its use of "set-asides" or other techniques that allow minorities to avoid the competitive bidding process. This legal opinion was brought to Congress' atten-

Such action would exacerbate the already-conspicuous racial imbalance in the construction industry.¹¹ WMATA's wrap-up insurance program was expressly implemented to assure that "no minority contractor will be denied a contract because of his inability to secure General Liability and Workmen's Compensation Insurance."¹² Both Congress and the District of Columbia acknowledged and approved the positive effect of WMATA's wrap-up program for increasing minority participation.¹³

A principal advantage to minority contractors of wrap-up insurance is that it eliminates the cost of insurance when bidding on a project. The fledgling status of many minority contractors makes them an unknown risk to insurance companies. Additionally, minority contractors are often undercapitalized, having little equity with which to guarantee the continuous and timely payment of premiums. It is a common commercial response on the part of the insurance industry to charge an increased premium to such concerns. Unfortunately, these new concerns lack

tion at the same time Congress was informed of WMATA's wrap-up insurance programs, which made such alternatives unnecessary. *See Hearings on Appropriations Before a Subcomm. of the House Comm. on Appropriations*, 92d Cong., 2d Sess. 442 (Mar. 20, 1972).

¹¹ *See, e.g., United Steel Workers of America v. Weber*, 443 U.S. 193, 198 n.1 (1979) (collecting such findings).

¹² Paper on Benefits to Minority Contractors from Coordinated Insurance Program, submitted by WMATA General Manager Jackson Graham to WMATA's Board of Directors on July 20, 1971. A copy of the paper is included in Appendix A to this brief.

¹³ A congressional bill to prevent the use of wrap-up programs in the District of Columbia died in committee. H.R. 15627, 91st Cong., 2d Sess. (1970). The District of Columbia opposed the bill on the ground, *inter alia*, that wrap-up programs "would make it easier for smaller companies to participate [in public construction projects]." *See Letter to The Honorable John J. McMillan from Mr. Graham W. Watt, Ass't to the Commissioner*, dated April 3, 1970, and submitted at the April 7, 1970, hearing on the bill. A copy of Mr. Watt's letter is included in Appendix B to this brief.

the profit margins of more established firms, and the additional cost of paying insurance premiums will frequently make the difference between the successful or unsuccessful competitive (lowest) bid.

The reduction of minority participation in projects subject to the LHWCA is directly contrary to the efforts of the federal government to increase minority participation in the construction industry. For example, the Urban Mass Transportation Administration ("UMTA"), which administers the federal funds provided to WMATA, has expressly recommended wrap-up programs as a means of reducing the financial barriers that typically bar minority participation. In fact, UMTA directs applicants for federal funds to consider "providing wrap-up insurance for contractors and subcontractors" as a "means to overcome barriers to [minority] program participation."¹⁴

Furthermore, a detailed study of wrap-up programs performed for the United States General Services Administration recommended the use of wrap-up programs for all projects exceeding \$20 million in total costs, and also expressly recognized that such programs maximize minority participation.¹⁵ A similar study performed for the United States Department of Transportation also recommended the implementation of wrap-up insurance programs for all major construction projects, again noting that such coverage is the only practical way that minority concerns can effectively compete for subcontracts on such projects.¹⁶

¹⁴ See UMTA, Department of Transportation, Circular C1165.1, p. 14 (Dec. 30, 1977), *superseded by* 49 C.F.R. § 23.45, Appendix A (1982).

¹⁵ See General Services Administration, *Wrap Up Study*, p. 14 (Aug. 22, 1975).

¹⁶ See Barrett, *Insurance for Urban Transportation Construction*, Report No. UMTA-MA-06-0025-77-13, pp. 1-21 (Dept. of Transp. 1977).

C. The Court of Appeals' Decision Will Subject The Employees of Minority Contractors To Periods Without Compensation Coverage.

For those minority contractors who do make successful bids, it is inevitable that their employees will be subjected to periods without compensation coverage, which is a result obviously contrary to the principal purpose of the LHWCA. Many minority contractors do not have the commercial experience and knowledge of the insurance industry to calculate accurately the cost of insurance when submitting a bid that may be two or three years in anticipation of actual work. The premiums for compensation coverage, already high, can sharply increase over the lifetime of a contract because of legislative action and actual loss experience. In areas subject to the LHWCA, rates are based on an employee's salary and the nature of his or her occupation, and comprise approximately two-thirds of the total insurance costs for construction projects.¹⁷ Rates as high as \$50 for every \$100 in salary can be assessed for tunnel workers.¹⁸ Accordingly, the premiums for compensation insurance constitute a substantial portion of the bid price on a construction contract. If a minority contractor miscalculates the cost of premiums (or any other such substantial cost), the contractor will be faced with the dilemma of making a payroll or paying insurance premiums. The pressures to take the first option are obvious. Any missed premiums would result in the termination of insurance, thereby exposing employees to periods without coverage for compensation and subjecting the contractors to possible criminal penalties. See 33 U.S.C. § 938.

Another factor causing lapses in insurance coverage is the utilization of financially uncertain insurance companies. It is an unfortunate fact of commercial life that minority contractors are not attractive as customers for

¹⁷ *Id.* at 4-1.

¹⁸ *Id.* at 4-2.

established insurance carriers. Many minority contractors are forced to use smaller, fiscally weak insurance companies because they are the only carriers willing to offer them coverage. Such carriers can and do fail for various reasons, again exposing employees to periods without coverage.

D. The Court of Appeals' Decision Will Cause an Enormous Drain on WMATA's Limited Federal Funds, Further Reducing Minority Participation in the Metro Project.

The construction of the WMATA mass transit system is a multi-billion dollar, federally-financed project, with approximately eighty percent of the capital funds provided by the United States.¹⁹ The availability of these funds has steadily declined, which will necessarily cause decreased opportunities for minority participation in the WMATA construction project and in other such programs.²⁰ The third-party litigation invited by the decision below will result in an enormous drain on these limited federal funds, further decreasing the opportunities for minority contractors to participate in the construction industry.

The Court of Appeals' decision allows any compensation claimant to bring a third-party action against the general contractor who secured the payment of the claimant's compensation benefits. To date, there have been 22,000 such claimants,²¹ and the Court of Appeals' decision

¹⁹ See Brief for the Petitioner at 41-42, 44, n. 68.

²⁰ The federal government has recently set the goals for minority participation in federally-financed transportation projects below the goals previously set by WMATA, thereby causing increased concern by WMATA and the District of Columbia that the level of minority participation in the WMATA project will decrease. See *Metro Is Urged to Set Minority Goals Higher*, Wash. Post, Nov. 24, 1983 at B2.

²¹ See Brief for the Petitioner at 36.

has already created a litigation explosion of third-party actions against WMATA that are continually being filed and have congested the United States District Court for the District of Columbia.²² The litigation expenses for defending these actions²³ and the costs of satisfying any judgments could run literally into the millions of dollars. WMATA would have no choice but to cut back on its construction projects and to shift its limited resources to meet these unexpected litigation costs.

The decision below will also cause the needless expenditure of limited funds to pay the increased costs of individual coverage for each subcontractor. Wrap-up programs greatly reduce the administrative costs of insurance and avoid wasteful duplication of effort and overlapping coverage.²⁴ These increased costs are reflected in higher premiums which subcontractors must include in their bids, thus passing the costs onto the general contractor. The Court of Appeals' rejection of WMATA's wrap-up program will reimpose the higher costs of individual coverage, further reducing the funds available for construction.²⁵

Accordingly, the Court of Appeals' decision denies the LHWCA's intent of minimizing litigation and will result in an enormous expenditure of limited funds to cover litigation fees and increased insurance costs, at the expense of public projects and to the detriment of the minority and non-minority contractors that would have

²² See Brief for the Petitioner at 36.

²³ As this Court and Congress have agreed, the primary beneficiaries of such third-party actions are lawyers, not injured employees. *Bloomer v. Liberty Mutual Ins. Co.*, 445 U.S. 74, 83-86 (1980); *Hearings on H.R. 247, et al., Before Select Subcomm. on Labor of the House Comm. on Education and Labor*, 92d Cong., 2d Sess. 106 (1972).

²⁴ See Brief for the Petitioner at 39, n. 56.

²⁵ See Brief for the Petitioner at 40-43.

otherwise participated in the construction of such projects.

E. The Court of Appeals' Decision will Dissuade Contractors from Utilizing Subcontractors Because of their Exposure to Liability for Negligence Actions.

Minority contractors are typically sub-subcontractors on large projects such as the WMATA System. The decision below will subject WMATA's subcontractors to liability for any negligence claims asserted by the injured employees of such sub-subcontractors. An obvious way to eliminate this exposure will be for the contractor or any other intermediate contractor to perform directly the work that would otherwise be subcontracted out to a minority contractor.

Title VI and related statutes prohibit any discrimination in federally-funded programs, including the Metro project.²⁶ The regulations implementing these statutes affirmatively require WMATA and its subcontractors to utilize good faith efforts to ensure minority participation in the Metro project.²⁷ These good faith efforts, however, will clearly be tempered by the exposure to common law liability that WMATA's subcontractors will have because of the Court of Appeals' decision. Subcontractors will have to decide between meeting a "good faith efforts" goal of increased minority participation through the use of sub-subcontractors and avoiding liability for third-party actions by not using sub-subcontractors. The pressure to take the latter course is especially powerful with minority contractors, who are typically an unknown risk because they are new concerns without established loss and safety records. Accordingly, the Court of Appeals'

²⁶ See, e.g., Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d-2000d-5 (1976); Section 12 of the Urban Mass Transportation Act of 1964, 49 U.S.C. § 1608(f) (1976).

²⁷ See 49 C.F.R. §§ 23.43-23.45 & Appendix A (1983).

redrafting of the LHWCA will unnecessarily frustrate the goals of Title VI and related federal statutes and regulations. By entering the legislative realm, the Court of Appeals has clearly disturbed the delicate balancing of various legislative policies associated with the LHWCA, Title VI, and the other pertinent provisions, statutes, and policies.

CONCLUSION

In order to provide second recoveries for these respondents, the Court of Appeals has ignored Section 904 of the LHWCA and created a new scheme for compensation coverage. The Court of Appeals has rejected a federally-recommended method which ensured that all employees at all times have compensation coverage. This insurance program also greatly enhanced minority participation in the construction of the federally-financed WMATA mass transit system. Without this program, most minority contractors would be unable to continue participation in the project, and the remaining minority contractors would unavoidably subject their employees to periods without compensation coverage, because of the unreliability of the carriers who insure them or because of the minority contractors' inability to meet the large periodic premiums. The decision below, therefore, defeats the goal of the LHWCA to ensure continuous compensation coverage and the goal of the various federal statutes and regulations seeking to enhance minority participation in the construction industry. Once again, the Court of Appeals has demonstrated the pitfalls of judicial intrusion into the legislative realm. This Court has recently reminded the Court of Appeals: "As with other problems of interpreting the intent of Congress in fashioning various details of . . . legislative compromise, the wisest course is to adhere closely to what Congress has written."²⁸ Accordingly, the National Association of

²⁸ *Rodriguez v. Compass Shipping Co.*, 451 U.S. at 617.

Minority Contractors respectfully urges the Court to reverse the decision below.

Respectfully submitted,

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APPENDICES

TABLE OF CONTENTS

	Page
APPENDIX A—Paper on Benefits to Minority Contractors from Coordinated Insurance Program, submitted by WMATA General Manager Jackson Graham to WMATA's Board of Directors on July 20, 1971	1a
APPENDIX B—Letter to The Honorable John J. McMillan from Mr. Graham W. Watt, Ass't to the Commissioner, dated April 3, 1970	6a

APPENDIX A

WASHINGTON METROPOLITAN AREA
TRANSIT AUTHORITY
950 South L'Enfant Plaza, S.W.
Washington, D.C. 20024

July 20, 1971

MEMORANDUM TO: Chairman and Board of Directors

SUBJECT: Metro Minority Enterprise Program

Attached hereto are copies of the eleven papers scheduled to be presented at the 242nd meeting of the Board of Directors on July 22, 1971. The papers are identified as follows:

Topic A. Background and Status of Minority Enterprise Program

- " B. Report on Minority Enterprise Programs of DOT and Eight Local Jurisdictions
- " C. Review of Federal and State Laws Relative to Competitive Bidding
- " D. Review of WMATA Law Relative to Competitive Bidding—Applicability of SBA 8(a) Program—Possible Language to Amend Compact—Local Community Participation Required by Court Order
- " E. Liaison with WACA—Monitoring of Contractors
- " F. Benefits to Minority Contractors from Coordinated Insurance Program—Diversion of D.C. Contributions Earnings to Finance Technical Assistance
- " G. Sizing of Metro Construction Contracts

- " H. Analysis of Rhode Island Station Contract Sizing
- " I. Outlook for Minority Prime Contractors on Metro
- " J. Minority Contractor Technical Assistance Proposal
- " K. Staff Position and Recommendations

/s/ Jackson Graham
JACKSON GRAHAM

* * * *

WASHINGTON METROPOLITAN AREA
TRANSIT AUTHORITY
950 South L'Enfant Plaza, S.W.
Washington, D.C. 20024

TOPIC F

I. BENEFITS TO MINORITY CONTRACTORS FROM
COORDINATED INSURANCE PROGRAM

The qualified minority contractor is confronted with two major problems as he seeks to become involved in the construction of Metro: 1) meeting the insurance requirements; and 2) meeting the bonding requirements.

The Authority's coordinated insurance program will, in and of itself, resolve in large measure the insurance program. On July 29 the staff will recommend to the Board an insurance carrier to write Workmen's Compensation and primary General Liability insurance for Metro, its contractors and sub-contractors. This carrier will also commit itself to participate fully in the SBA (Small Business Administration) bonding program as authorized by the Congress in 1970.

1) *Insurance*: A major benefactor of the Authority's coordinated insurance program is the minority contractor—in two important areas. First, the minority contractor simply cannot provide prudent insurance limits commensurate with the risks involved. Secondly, even in providing minimum insurance limits and coverage he is at an extreme disadvantage costwise in negotiating the insurance contract. Putting it another way, the minority contractor cannot negotiate the kind of favorable position in the procurement of insurance as the large, experienced contractor. Under the Authority's coordinated insurance

program no minority contractor will be denied a contract because of his inability to procure General Liability and Workmen's Compensation insurance. Insurance, with broad coverage and substantial limits, will be provided for him under the program.

2) *Bonding*: Public Law 91-609, effective January 8, 1971, authorizes SBA to guarantee up to 90% of a surety's losses on a particular construction contract. SBA cannot guarantee any contract where the face value exceeds \$500,000. To qualify for this program a minority contractor must have had less than \$750,000 in gross annual receipts for the past 12 months or averaged less than this amount annually over the past 36 months. With regard to underwriting standards, in a public statement SBA has stated, "We do not want sureties to lower their underwriting standards so as to permit unqualified contractors to get bonded. Rather, we would hope to assist small competent contractors to become more qualified for bonding." The insurance carrier the staff will recommend to the Board on July 29, as stated earlier, will agree to participate fully in the SBA program and will agree to underwrite the remaining 10% risk.

Bonding by itself does not resolve the real problem. As previously reported to the Board, the staff has over a period of months strongly urged the Department of Transportation to fund a technical assistance program for minority contractors. Many minority contractors are denied the right to participate in the construction industry because, even though they may be otherwise qualified, they lack the technical qualifications, management capacity, etc., to be considered qualified for bonding purposes. Favorable action by DOT in funding a technical assistance program would be a significant boost to the Authority's program.

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It is also noted that the Board has previously authorized a full-time bonding expert to be employed by the Authority's insurance administrators for the primary purpose of assisting minority contractors in the procurement of bonding.

* * * *

APPENDIX B

[SEAL]

GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE
Washington, D.C. 20004

April 2, 1970

The Honorable John L. McMillan
Chairman
Committee on the District of Columbia
United States House of Representatives
Washington, D.C. 20515

Dear Mr. McMillan:

The Commissioner of the District of Columbia has for report H.R. 15627, a bill "To provide for the fair and impartial letting of public contracts."

The bill would make it the duty of the District's Superintendent of Insurance to make sure that no person acting in an official capacity for the District Government with respect to letting contracts for public buildings and construction shall require the bidder to obtain the insurance or surety bonding necessary for the project from a particular insurer or surety company. The bill further prohibits any District employee or agent from acting in behalf of, or negotiating for, the bidder in obtaining insurance or surety bonds for a project.

The effect of H.R. 15627 would be to make it public policy to have bidders on public construction contracts obtain their own insurance based on what is required in the contract and the private contractor's own needs. This has been the procedure the District Government has been following to date.

However, it has been suggested by some persons knowledgeable in the area of insurance and surety bonding for public construction projects that there may be certain advantages to be gained by having the owner (or, in this case, the District Government) obtain a blanket insurance policy from a single source. Advocates of this method argue that it would save public money and result in more complete coverage for all concerned. Although large contractors are usually able to work out very favorable and continuing arrangements with insurance companies, many small or less-established construction companies find it difficult to obtain the insurance or bonding necessary to participate in public construction projects. A blanket insurance policy obtained by the District Government for all contractors and sub-contractors in a particular project would make it easier for the smaller companies to participate.

Absent sufficient evidence or experience with blanket insurance policies, it is difficult to make a decision on the relative merits of blanket insurance policies versus conventional insurance. At present, the conventional methods have met the needs in the District, but as the insurance market changes and the insurance companies themselves find new ways to present their product, it may well be that in some cases greater economies would be realized by obtaining a blanket policy or some variation of that concept. It does seem quite evident that only in special cases would blanket insurance be useful.

The Commissioner believes that it would be unwise to deny the District Government the opportunity to consider a blanket insurance program when sound public policy indicates that such a program should be considered. Rather, the Commissioner believes that the objective of fair and impartial letting of public contracts would best be served by permitting the District of Columbia Government, in its contracting functions, continued flexibility in determining the terms upon which bids will be based.

For these reasons, the Commissioner recommends against enactment of H.R. 15627.

Sincerely yours,

/s/ Graham W. Watt
GRAHAM W. WATT
Assistant to the Commissioner

FOR: WALTER E. WASHINGTON
Commissioner of the
District of Columbia

No. 83-747

Since Supreme Ct. U.S.

FILED

MAR 1 1984

ALEXANDER L. STEVAS.
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1983

WASHINGTON METROPOLITAN AREA
TRANSIT AUTHORITY,
Petitioner,

v.

PAUL D. JOHNSON, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals
for the District of Columbia Circuit

BRIEF FOR THE COMMONWEALTH OF VIRGINIA
AND THE STATE OF MARYLAND AS
AMICI CURIAE IN SUPPORT OF THE PETITIONER

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QUESTIONS PRESENTED

1. Whether the builder of an interstate rapid transit system that purchases compensation benefits for injured laborers pursuant to its obligation under a federally approved interstate compact to act as general contractor is entitled to the statutory immunity from suit granted to contractors by the Longshoremen's and Harbor Workers' Compensation Act, or whether, as held by the District of Columbia Circuit, injured employees may recover both compensation and damages from the builder.

2. Whether the builder forfeits its statutory immunity from suit simply because it initially purchased workers' compensation protection for all construction employees rather than first demand that contractors—many of whom were uninsurable—themselves obtain workers' compensation insurance.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	(i)
INTEREST OF <i>AMICI</i>	1
INTRODUCTION AND SUMMARY OF ARGUMENT	3
ARGUMENT	3
A. The Court Of Appeals' Construction Of The LHWCA Cannot Be Reconciled With The Plain Language Of The Act	3
B. WMATA Is Entitled To Immunity As A "Statutory Employer"	4
CONCLUSION	10

TABLE OF AUTHORITIES

Cases:

<i>Anderson v. Thorington Construction Co.</i> , 201 Va. 266, 110 S.E.2d 896 (1959), <i>appeal dismissed for want of a properly presented substantial federal question</i> , 363 U.S. 719 (1960)	4, 5
<i>Consumer Product Safety Commission v. GTE Sylvania, Inc.</i> , 447 U.S. 102 (1980).....	4
<i>Evans v. Newport News Shipbuilding & Dry Dock Co.</i> , 361 F.2d 364 (4th Cir.), <i>cert. denied</i> , 385 U.S. 959 (1966)	4
<i>State ex rel. Reynolds v. City of Baltimore</i> , 199 Md. 289, 86 A.2d 618 (1952)	4, 5
<i>Sumitomo Shoji America, Inc. v. Avagliano</i> , 457 U.S. 176 (1982)	5

Statutes:

33 U.S.C.	
§ 904	<i>passim</i>
§ 905	<i>passim</i>

¹TABLE OF AUTHORITIES—Continued

	Page
Washington Metropolitan Area Transit Authority Compact, Pub. L. No. 89-774, 80 Stat. 1324 (1966)	1
Md. Code Ann. § 10-204 (1977)	1
Md. Code Ann. art. 101, § 62 (Michie 1979 & Supp. 1983)	4
Va. Code Ann. § 56-529 (1981)	1
Va. Code Ann. § 65.1-30 (1980)	4
§ 65.1-40 (1980)	4
1982 Va. Acts ch. 684, April 21, 1982	6
Miscellaneous:	
Lynton, <i>Metro's Deficit: Relentless Problem</i> , Wash. Post, April 17, 1983 at B1, B7	6

IN THE
Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-747

WASHINGTON METROPOLITAN AREA
TRANSIT AUTHORITY,
Petitioner,

v.

PAUL D. JOHNSON, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals
for the District of Columbia Circuit

BRIEF FOR THE COMMONWEALTH OF VIRGINIA
AND THE STATE OF MARYLAND AS
AMICI CURIAE IN SUPPORT OF THE PETITIONER

INTEREST OF AMICI

The Commonwealth of Virginia and the State of Maryland are signatories to the Washington Metropolitan Area Transit Authority Compact, Pub. L. No. 89-774, 80 Stat. 1324 (1966). See Ch. 2, 1966 Acts of Assembly, Va. Code Ann. § 56-529 (1981); Ch. 869, Acts of General Assembly 1965, Md. Code Ann. [Transportation] § 10-204 (1977). The Compact

created the Washington Metropolitan Area Transit Authority ("WMATA") as the interstate agency of Virginia and Maryland, as well as the District of Columbia, and charged WMATA with the responsibility for constructing and operating the Metro Transit System for the people of the greater Washington, D.C. vicinity on behalf of the signatories. Virginia and Maryland have a continuing role in the construction and operation of the Metro Transit System through their representatives on the WMATA Board. In addition, Virginia and Maryland help to finance that system by contributing state funds for WMATA's operating budget, from which WMATA pays damage awards.¹ The decision below, if affirmed, will subject WMATA to tort liability atop the workers' compensation awards WMATA already has paid as general contractor for the Metro Transit System. Any such ruling would have a serious, adverse financial impact upon Virginia and Maryland. The decision below is therefore of substantial interest to both States.

Moreover, the decision below creates an anomaly in the law applicable to WMATA. The law of Virginia and Maryland clearly would provide a general contractor like WMATA with complete immunity from suit for all employment-related accidents. Prior to the decision of the court below, it was presumed that the same principles of immunity would be applicable in the District of Columbia. If the lower court decision is allowed to stand, that would no longer be true.

¹ The suburban Virginia communities served by the Metro Transit System also contribute to its operation.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Court of Appeals' decision disregards both the plain language of the applicable statutes and the *quid pro quo* nature of workers' compensation. That decision, moreover, is inconsistent with the signatories' understanding of the law applicable to WMATA at the time of the adoption of the WMATA Interstate Compact, and is at odds with the law applicable to WMATA in the States of Virginia and Maryland. Unless the decision below is reversed, WMATA will be subjected to substantial additional liability under the law of the District of Columbia and will be forced to endure substantial additional litigation that has to date been unnecessary. The signatories, and people of both States, will be deprived of the benefits of WMATA's wrap-up program, and forced to bear unnecessary additional costs in the construction and operation of the Metro Transit System.

ARGUMENT

A. The Court of Appeals' Construction Of The LHWCA Cannot Be Reconciled With The Plain Language Of The Act.

The issue of statutory construction is being dealt with by petitioners and therefore will not be discussed at length here. Suffice it to say that the entirely new responsibility created by the Court of Appeals for contractors cannot be found in the text of the statute. The plain language of the Act requires a contractor to secure workers' compensation coverage, and nowhere requires a contractor to force a subcontractor to do so. There is nothing in the legislative history or purposes of the Longshoremen's and Harbor Workers' Compensation Act ("LHWCA") or the District of Columbia Workmen's Compensation

Act ("DCWCA") to suggest that Congress intended contractors to pursue the two-step process described by the Court of Appeals. The plain meaning of Section 904(a) is therefore conclusive. *See, e.g., Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980).

B. WMATA Is Entitled To Immunity As A "Statutory Employer."

1. It is important to emphasize that the law of Virginia and Maryland would clearly provide a private or public general contractor² like WMATA with complete immunity from tort suits like those brought by respondents in the circumstances of this case. *See, e.g., Va. Code Ann. §§ 65.1-30 and 65.1-40 (1980); Evans v. Newport News Shipbuilding & Dry Dock Co.*, 361 F.2d 364 (4th Cir.), *cert. denied*, 385 U.S. 959 (1966); *Anderson v. Thorington Construction Co.*, 201 Va. 266, 110 S.E.2d 396 (1959) (analogous relationships to those in the instant case), *appeal dismissed for want of a properly presented substantial federal question*, 363 U.S. 719 (1960); *Md. Code Ann. art. 101, § 62 (Michie 1979 & Supp. 1983);*

² As discussed above, WMATA is an interstate agency created by the WMATA Interstate Compact and entrusted with the responsibility for carrying out the purposes of that Compact: namely, the construction and operation of the Metro Transit System. In that respect, WMATA has the ultimate responsibility for assuring that the construction project authorized by the Compact is completed. WMATA, furthermore, has, and exercises through its Department of Design and Construction, the authority to supervise construction on a day-by-day basis of the numerous subcontractors it has engaged to perform the actual construction work. Hence, we agree with the unanimous conclusion of the lower courts that WMATA is a "contractor" for the purposes of LHWCA Section 904(a). *See, e.g., Pet. App. 1a, 6a, 14a, 24a, 28a.*

State ex rel. Reynolds v. City of Baltimore, 199 Md. 289, 86 A.2d 618 (Md. 1952).³ This is not only true today, but also was true at the time Virginia and Maryland entered into the WMATA Interstate Compact. See *Anderson v. Thorington Construction Co.*, *supra*; *State ex rel. Reynolds v. City of Baltimore*, *supra*. And, based upon prior judicial interpretations of the LHWCA and DCWCA and their underlying purposes, the Acts granted the same degree of immunity to the general contractor. Nothing has been found in the legislative history of Virginia's and Maryland's consideration of the Compact which suggests anything to the contrary. In these circumstances, the signatories' mutual understanding of the liabilities that WMATA would incur under the Compact in the workers' compensation context is entitled to substantial deference. Cf. *Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176, 185 (1982).

Virginia and Maryland entered into the WMATA Compact to resolve transportation problems of mutual concern. WMATA was created to serve as the interstate agency through which both signatories could achieve those goals. Cost is obviously a factor that was given a great deal of attention, and, even though it is recognized that no one can predict the future course of the law with complete accuracy, it can be confidently stated that no one ever predicted that WMATA would be subjected to the double or additional liability that the Court of Appeals has approved. Denying WMATA immunity in the factual setting of this litigation would subject Virginia and

³ To be sure, Section 80 of the WMATA Compact requires the law of the signatories to be applied. Nonetheless, where there is ambiguity in the law of any one signatory, substantial weight should be given to the fact that uniformity is of value to an interstate agency like WMATA.

Maryland to substantial additional liability for injury claims arising out of the construction of the still-incomplete Metro Transit System.

While WMATA's revenues are intended to be the principal source of its operating funds, Virginia and Maryland, along with the District of Columbia and the federal government, compensate for any deficit with State funds. *E.g.*, 1982 Va. Acts ch. 684, Apr. 21, 1982 (approving over \$40 million for FYs 1982-1984). These subsidies may exceed \$200 million for 1984, aside from the effects of the decision below. Lynton, *Metro's Deficit: Relentless Problem*, Wash. Post, Apr. 17, 1983, at B1, B7. WMATA has already paid over 22,000 compensation claims since its wrap-up program went into effect on July 31, 1971. A ruling that exposes WMATA to thousands of suits still within the statute of limitations for past injuries and to an untold number of future suits would plainly have a substantial adverse impact upon the States' treasuries. It is highly unlikely that Virginia and Maryland would have assumed such liability for an *interstate agency* where *private* contractors would not be liable under either State's law.

Further, it is important to have a uniform understanding of the liabilities to which WMATA would be subject. Given the law in Virginia and Maryland, it is clear that WMATA could not be subject to compensation and tort liability if sued under the law of the States. But there are substantial problems that can arise in the determination of the particular law applicable in a given case that can effectively undercut the immunity WMATA would receive from Virginia and Maryland law.

For instance, construction workers will oftentimes work on different projects at various sites throughout

the Metro Transit System, some of which will be located in the District of Columbia while others are situated in the States. In fact, most of the construction has now shifted to the Virginia and Maryland segments of the system. If the Court of Appeals' view were upheld, any employee will allege that he worked in the District of Columbia and will surely claim that his alleged lung injuries were suffered while working there—an allegation that WMATA will often find difficult, if not impossible, to refute.

In such cases, WMATA will therefore consistently find itself in the position of defending tort suits governed by District of Columbia law because only the law of that jurisdiction would enable a construction laborer to obviate the immunity WMATA would receive under both States' law. That result will raise a welter of litigation with respect to the law applicable to WMATA. Plainly, no one but lawyers are benefitted by such litigation. The only alternative is to balkanize any future construction of Metro into discrete construction units, an approach which would unnecessarily restrict WMATA's ability to complete the Metro Transit System in a responsible, cost-effective manner.

That problem is also not limited to construction of the Metro Transit System. WMATA's ability to use a wrap-up program, or similar types of insurance coverage, for everyday injuries arising out of the operation of the Metro would similarly be subject to the vagaries of the site which a claimant could allege as the basis for an injury. Hence, a return to the previous understanding of the law applicable to WMATA, to the extent possible, will best enable the

States to continue to carry out their original goals in the manner that serves the public's needs without unnecessarily complicating WMATA's obligations.

2. Workers' compensation legislation represents a classic compromise of interests for the general good. Employees forsake their common law remedies in order to obtain fixed, prompt benefits. Employers are relieved of expensive litigation, but agree to pay those fixed benefits timely. Given that *quid pro quo*, Congress' failure to repeat the term "contractor" in Section 905(a) is therefore of no consequence. Because the second sentence of Section 904(a) requires a contractor to fulfill the same duties as a subcontractor-employer, the most natural reading of Section 904(a) and 905(a) would afford a contractor the same immunity that Section 905(a) would provide a subcontractor-employer. The contrary conclusion would assume that Congress intended to deny contractors, alone of all the parties required by the LHWCA to obtain workers' compensation coverage, the immunity from suit that had been a hallmark of every workers' compensation program ever adopted. Because nothing in the legislative history or purposes of the LHWCA or DCWCA suggests any such result, it is entirely reasonable to interpret these sections as supplying contractors with immunity from tort suits where a contractor has fulfilled its statutory duty to secure compensation coverage.

3. A denial of immunity would also threaten to undermine a long-standing, necessary, and cost-efficient means of providing workers' compensation coverage for Metro construction employees. WMATA's

wrap-up program is similar to those now universally employed in large construction projects, including ones in the States of Virginia and Maryland. Wrap-up programs efficiently provide a myriad of benefits that would otherwise be lost if each individual subcontractor were forced to obtain its own compensation coverage, assuming that each could do so. See Pet. Br. 39-41 & n.56. At the same time, the cost to the public of the WMATA wrap-up program is a far lower cost than that of thousands of individual insurance policies. Denying WMATA immunity from suit would eliminate those cost savings and undermine the integrity of the entire wrap-up program. There is no reason to disregard these benefits—as the Court of Appeals did, see Pet. App. 55a—since WMATA's program furthers the purposes of the Act by assuring that employees are fully covered by workers' compensation insurance.

4. Finally, denying WMATA immunity from suit leads to results that Congress could not have intended. *First*, such a ruling would deny WMATA any *quid pro quo* for its purchase of compensation insurance. *Second*, that outcome will lead to delay in the award of compensation benefits and an enormous increase in the litigation of employment-related injuries. Subject to both compensation and tort liability, contractors will surely attempt to cut their losses by demanding indemnification agreements from subcontractors. That will, in turn, lead to additional litigation. At the same time, employees will surely not forego the opportunity to add to their total recovery by bringing tort suits against WMATA.

CONCLUSION

It seems incongruous under the facts of this case that a concerned contractor—securing wrap-up insurance for the benefit of employees, for the benefit of the signatories, and for the benefit of potential bidders—will now not be able to avail itself of the statutory immunity from common law actions that had historically been available under workers' compensation programs. This result, in the face of the language of Sections 904 and 905(a), can only be described as Dickenseseque.

For the foregoing reasons, and the reasons given in Petitioner's brief, the judgment of the United States Court of Appeals for the District of Columbia Circuit should be reversed, and the case remanded with directions to reinstate the judgments of the District Court dismissing the complaints.

Respectfully submitted,

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No. 83-747-CFX
Status: GRANTED

Title: Washington Metropolitan Area Transit Authority,
Petitioner
v.
Paul D. Johnson, et al.

Docketed:
November 4, 1983

Court: United States Court of Appeals for
the District of Columbia Circuit

Counsel for petitioner: Prettyman Jr., E. Barrett

Counsel for respondent: Mulroney, William F.

Entry	Date	Note	Proceedings and Orders
1	Nov 4 1983	G	Petition for writ of certiorari filed.
2	Nov 30 1983		Brief of respondent Paul D. Johnson in opposition filed.
3	Dec 2 1983		Brief amicus curiae of Natl. Assn. of Minority Contractors filed.
4	Dec 2 1983		Brief amicus curiae of Virginia, et al. filed.
5	Dec 8 1983		Reply brief of petitioner WMATA filed.
6	Dec 21 1983		DISTRIBUTED. January 13, 1984
8	Jan 16 1984		Petition GRANTED. *****
9	Jan 24 1984		Record filed.
10	Jan 24 1984		Certified original record & C.A. proceedings, 2 boxes, received.
11	Mar 1 1984		Brief amicus curiae of Alliance of American Insurers filed.
12	Mar 1 1984		Brief amicus curiae of Natl. Assn. of Minority Contra filed.
13	Mar 1 1984		Brief amicus curiae of Virginia, et al. filed.
14	Mar 1 1984		Brief of petitioner WMATA filed.
15	Mar 1 1984		Joint appendix filed.
16	Mar 20 1984		SET FOR ARGUMENT. Tuesday, April 24, 1984. (4th case)
17	Mar 30 1984		Brief amicus curiae of Certain Metro Subway Construction Contractor-Employers filed.
18	Mar 30 1984		Brief of respondents Paul D. Johnson, et al. filed.
19	Apr 2 1984		CIRCULATED.
20	Apr 17 1984	X	Reply brief of petitioner WMATA filed.
21	Apr 24 1984		ARGUED.